

THE LAW OF STRĪDHANA (THE HINDU WOMAN'S SEPARATE
ESTATE) WITH SPECIAL REFERENCE TO ACQUISITION,
POWERS OF DISPOSITION AND INTESTATE SUCCESSION.

BY REGE, PRABHAKAR WAMAN.

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PREFACE

Before placing this thesis in the hands of its examiners and readers I must express my gratitude to Dr.J.D.Derrett without whose vigilant supervision I would have unknowingly fallen into many errors and would have written a lot of gibberish. As L.P.Smith puts it,"It is an advantage for an author to have two or three fastidious readers whom he can imagine sniffing at his pages." Dr. Derrett's suggestions gave me ample opportunities of judging the truth of the epigram, "Trifles make perfection though perfection is itself no trifle."

I have also to thank miss Ysabel Pearce, Mr.Nadirkhan Pathan and Mr.S.R.Gupta who ungrudgingly undertook the task of typing this intricate thesis. I am also obliged to Mrs. Helen Kanitkar for having gone through the introductory as well as the concluding chapters, and to Mr.S.Ganeson and Mr.M.Sivalingam for having helped me in correcting the typescript.

I am indebted in general to a galaxy of Hindu law scholars both dead as well as living from whom I am constantly gaining some knowledge for the last twelve years. I always have great respect for them and their opinions. But in writing this thesis I had to contradict them at some places; for my motto is, "Amicus Plato, amicus Sodnates, sed magis amica veritas."

ABSTRACT OF THE THESIS

The main topic of the thesis has been divided in two parts, namely, śāstric law and judge-made law. For the former several Sanskrit works whether published or otherwise and whether in the Devanāgarī or the Bengali script have been considered. Pit-falls of erroneous translations have been avoided by giving references to the original texts at all places. With the help of the added śāstric information new light has been thrown on questions such as whether inherited property is strīdhana according to the various Mitākṣarā sub-schools; whether such property should be considered as saudāyika; what are the rights of a childless daughter, adopted son, illegitimate children etc. in succession to strīdhana; whether degradation amounts to civil death etc.

For the latter part more than 500 decisions have been considered. They have been arranged and analysed with a view to demonstrate the growth not only of the judge-made law but also of the rift between the śāstric law and the judge-made law. Incongruity, if any, amongst several decisions on the same point has also been pointed out.

A chapter on customary law contains special provisions concerning proprietary rights of prostitutes, and a gist of six systems of customary law from South-East Asia including India, Burma and Ceylon.

A chapter on the recently codified law in India contains also a scrutiny of the similar previous attempts in the former Native States of Mysore and Baroda. The chapter also contains a few comments concerning the defects and the deficiencies in the enacted law. The conclusion

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Hindu Succession Act 1956. S.14 confers on woman absolute interest in all property possessed by her. The phrase 'possessed by' and the three questions arising out of it. Venkayamma v. Veerayya. Possession means 'the state of owning'. Retrospective effect. S.14 does not apply to property sold without legal necessity etc. before the commencement of the Act. Different view of the Patna High Court. Allahabad High Court Cuts a midway. Property alienated without sufficient reason and before the enactment. Female has no interest in it and the purchaser cannot get his interest enlarged. S.14 sub-section(2). Effect of s.14. Sex distinctions have disappeared. Injustice to the daughter. S.6 deals with coparcenary property. Words 'after the commencement of the Act' superfluous. SS.8-16. Succession to the property of a daughter which she had inherited from her mother and which she has disposed of before the commencement of the Act. The phrase 'dying intestate.' Hindu Law Inheritance (Amendment) Act. The phrase is 'a mere description of the status of the deceased.' Same interpretation applicable to the Succession Act 1956. Reversioners under the old law have completely disappeared. Heirs in all cases to be ascertained according to the new law. Lateshwar v. Uma Ojhain : a whimsical decision. Salient features of the new line of succession to strīdhana. Two outstanding instances of the inconvenience produced by the provisions of the Act. S.15 sub-section (2) very badly drafted. Few other provisions affecting succession to strīdhana. S.16 of the Hindu Marriage Act. The position of illegitimate children of a void marriage. Adopted son.

Chapter VII. Conclusion.

Objections against codification. Suggestions for some amendments in the new enactments, Daughter's right of succession. Common property of husband and wife. Provision for divorce by mutual consent. Illegitimate children of a void marriage. Adoption despite the existence of natural-born children. War against prostitution. Two groups of critics who oppose equality between the two sexes. Whether economic, political and social equality must necessarily be contemporaneous. Example of England. Women's movement in India. Economic emancipation of women in India was not only timely but in fact belated. The way in which equality between the two sexes should, in practice, be exercised.

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Bibliography: (a) Books in Englishpp.726-734.

(b) Books in Sanskritpp.735-42.

List of Sanskrit verses..... pp.743-52.

The Hindu law in India has recently undergone a radical change, and judges, lawyers and social workers in India are busy in attempting to estimate the effects, beneficial or otherwise, of the radical reorientation that has been necessitated by the four Acts passed by the Indian Parliament in the years 1955-57.⁽¹⁾ The legislation, while it has delighted the progressive element amongst Indian sociologists, has nevertheless dismayed the public in general who did not know the law as it stood before and probably continue in that ignorance as to what the law is. The present work is an attempt to ascertain, within the limits of its subject, Hindu law as it stood before the change and as it stands today and, in completion of the study, tentatively to suggest the law as it ought to be in the future.

Two objections might be raised as regards the propriety of a work of such nature: firstly, that an attempt to ascertain the law as it was is entirely useless as it is of no help to lawyers as well as laymen either of whom are rarely interested in the legal position of the bygone days; secondly, that such an attempt has already been made, and perhaps with some success, by the previous scholars and text-book writers, which makes any further attempt redundant.

As regards the first objection it is true that the Hindu lawyers and scholars have usually treated with scant respect the study of the development of Hindu law and excepting a few instances the subject is decaying through lack of academic investigation.⁽²⁾ But when the personal law of nearly one-seventh of the whole human

(1) For these enactments see *infra* p. 638

(2) See Dr. J. D. M. Derrett's *Hindu Law : The Dharmashastra and the Anglo-Hindu law - scope for further comparative study*, *Zeitschrift für vergleichende Rechtswissenschaft* (1956) p. 199 at pp. 199-200.

race has been re-cast and re-established it is essential that a critical appraisal of the total effect as in comparison with the past notions and traditions should be made by persons who are interested in keeping the movement of Hindu law in the right direction. Moreover to understand the changes which the new enactments have introduced one must look to the law as it stood before and the proper understanding of the previous Hindu law can never be complete without visualising its development ab initio. It is also significant that when the bills proposing to change Hindu law concerning marriage, succession etc. were introduced in the Parliament both the supporters and the opposers contended that their respective positions were quite in conformity with the old śāstric law. Again the present changes need not be considered as final⁽¹⁾ and if, as is likely, there are going to be further changes it would be worthwhile to anticipate and suggest them right now.⁽²⁾ In view of the fact that nearly one per cent of the Indians reside outside India⁽³⁾ it is also important to note that the present changes in India do not apply to Hindus in Burma, Africa etc.⁽⁴⁾ It does not apply to Hindus in Pakistan also.

As regards the second objection it may be stated that the only work which purported exhaustively to deal with the subject of strīdhana is a publication in the Tagore Law Lectures Series by late Sir Gooroodas Banerji in 1878 the last edition of which was published in 1927. Although most of the standard text-books of the

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- (1) The Hindu Marriage Act of 1955 has already been amended by the Hindu Marriage (Amendment) Act 73 of 1956.
 - (2) For such suggestions see infra pp. 682-87, 688, 690-91 and the conclusion
 - (3) See India 1954 pp. 254-55 — a publication by the High Commissioner of India in Great Britain.
 - (4) See for instance Dr. J. D. M. Derrett: Hindu law in Kenya, A.I.R. (1958) Journal pp. 1-6.

present day tend to rely on Banerjee's opinions and suggestions, his book is evidently inadequate to expound the law as it stands today. Moreover even Banerjee's book, as we shall see, contains many inaccurate statements concerning the śāstric law.⁽¹⁾ The modern text book writers, though they mention the latest pre-enactment law in their recent editions, eliminate many Sanskrit texts and judicial decisions thus making it difficult easily to attain a complete understanding of the development of the law.⁽²⁾ Moreover the present work proceeds in ^{an} original manner different in certain respects from that adopted by the previous authors and contains some added information which has been utilised to give at once a clearer and a more accurate picture of the progress of the law.

Before passing to the subject in particular it is advisable to state the general background upon the assumption of which the present work proceeds viz. the general nature of Hindu law, its sources, its schools etc. As this general information does not come within the orbit of the topic of the present work it represents, with a few exceptions, the general consensus of opinion amongst the Hindu law scholars.

The Hindus always believed their law to be of divine origin and this law included both religious law and civil i.e. positive law as well.⁽³⁾ The idea of the Sovereign in the modern judicial sense

(1) For these see infra p. 20.

(2) For instance, the case of Pingala v. Bommireddipalli (infra p. 171) which has been mentioned by Banerjee (p. 367) has not at all been mentioned by Mayne or Gupte presumably because it was overruled by their Lordships of the Privy Council in Venkata Jagannatha's case (infra pp. 170-71). And moreover even the text-book writers have made several incorrect statements concerning the law of strīdhana. See infra pp. 20.

(3) W. & B. p. 9.

was unknown to them: the King was supposed to enforce the revealed law and not to enact law. As it was the King who was controlled by the law and not the law that was regulated by the King the royal edicts were binding on the public provided they were not repugnant to the divine law.⁽¹⁾ The duty of the King was to enforce the law which was ascertained with the help of the assessors who were expected to interpret the divine law but could not introduce new legislation.

The present Hindu law is based on the dharmaśāstra. The word 'dharma' includes "all kinds of rules religious, moral, legal, physical, metaphysical or scientific, in the same way as the term law does, in its widest sense."⁽²⁾ The word 'dharma' is derived from 'dhṛi' i.e. to hold, support or maintain and the word 'Śāstra' is derived from the root 'śās' i.e. to teach, enjoin or control. Dharma is a means of attaining complete happiness⁽³⁾ and its main source is the Vedic injunction or order⁽⁴⁾ which is the only proof (pramāṇa) of dharma.⁽⁵⁾ Although the dharmaśāstra deals with all the desirable ends of man, viz. the duty arising out of a vedic injunction (dharma) wealth (artha), other desirable ends (kāma) and liberation of soul (mokṣa) it primarily deals with dharma in particular, as the other desirable ends depend upon dharma itself, without the help of which

(1) Sarkar 6th edi.p.13. "Vyavahārānṛipah paśyedvidvadbhirbrāhmaṇaiḥ saha / Dharmaśāstrānusāreṇa krodhalobhavivarjitah // - Yaj.II.1, see Vis. on it. The śāstra admonishes a king who transgresses the orders of the Śāstra and collects money by taxes etc. without the authority of the Śāstra - Yaj.I.357 and Mit.on it, see also Yaj.I.340, also Sarkar 6th edi.p.13, W.& B. p.9 referring to Śaṅkara's bhāṣya on the Śatapatha Brāhmaṇa 14.2.2.3 and on Bṛihadāranyaka Upaniṣad 1.4.14.

(2) Sarkar p.17.

(3) Jai.Su.1.1.3: "Tasya nimittaparīṣṭih."

(4) Jai.Su.1.1.2: "Chodanālakṣaṇo'rtho dharmah."

(5) Jai.Su.1.1.5; infra pp 234 and 236

they cannot be attained. Thus wealth cannot be attained without dharma though dharma can be attained without wealth.⁽¹⁾

The intermingling of religion, ethics and law (in its positive aspect) is typical of all early communities and Hindu law was not an exception to that.⁽²⁾ The earlier codes of the dharma-śāstra such as the Manusmṛiti give us a clear impression that the positive law was treated almost as a part of the religious order of the society. Later on, however, authors such as Yājñavalkya are seen to distinguish between the different compartments of law i.e. the law pertaining to āchāra or rules of religious behaviour, vyavahāra or rules of positive law, and prāyaścitta or rules prescribing expiation in the absence of, or in addition to, any punishment prescribed by the positive law. The religious element in the positive law was on a gradual decrease till Vijñāneśvara and his followers clearly distinguished between the religious and the secular element

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- (1) See Mit.on Yaj.I.1: "Tatra yadyapi dharmārthakāmamokṣāḥ śāstrenānena pratipādyante tathāpi dharmasya prādhānyāt dharmag-
rahaṇam. Prādhānyam cha dharmamūlatvāditareṣām. Na cha vak-
tavyam dharmamūlo'rtho'rthamūlo dharma ityaviśeṣa iti. Yato'-
rthamantarenāpi japastīrthayātrādinā dharmanispatirarthaleśopi
na dharmamantareneti." However, it seems Vijñāneśvara is self-
contradictory here as he accepts that svatva is 'laukika' and
not 'Śāstraikasamadhigamya' - Mit. introduction to the Dāyavi-
bhāga Nir. edi.pp.197-98 infra.
- (2) "In primitive communities religion, morals and law were indis-
tinguishably mixed together..... This intermingling is typical
of all early communities. The severance of the three ideas - of
law from morality, and of religion from law - belongs very dis-
tinctly to the later stages-of mental progress. This severance
has gone a great way. Many people now think that religion and
law have nothing in common..... The severance has, I think,
gone much too far. Although religion, law and morals can be
separated, they are nevertheless still very much dependant on
each other. Without religion there can be no morality: and
without morality there can be no law." - Sir Alfred Denning :
The Changing Law p.99.

of the law and followed, wherever possible, the former in ascertaining the rules of positive law or vyavahāra.⁽¹⁾ It is upon 'vyavahāra' that the major portion of the present Hindu law may be considered to have been based.

Vyavahāra was that part of law a breach of which gave rise to a cause of action and might result in a judicial proceeding.⁽²⁾ It consisted of both the adjectival and the substantive law⁽³⁾ but some of the later authors wrote two different treatises for these two kinds of law.⁽⁴⁾ The adjectival part of the law was superseded long ago by enactments such as the Indian Evidence Act, Criminal Procedure Code, Civil Procedure Code etc. Even the substantive law which was divided by the Śāstra into eighteen titles⁽⁵⁾ has been gradually superseded by the Regulations and Acts of the Central and provincial governments up till and including the recent enactments passed by the Indian Parliament which have almost effaced the operation of the old Hindu law in India.

We may proceed to consider further the origin and sources of Hindu law. The sphere (sthāna) of dharma consists of the four Vedas with their six auxiliary sciences, the codes of the law i.e. the smṛitis, mīmāṃsā or the disquisition of the rules of scripture, nyāya or the science of logic, the purāṇas or the records of the legendary

(1) See infra.

(2) Yaj.II.5, Mayne 11th edi.p.7, see also Mit.on Yaj.II.1: "Anyavirodhena svātmāsambandhitayā kathanam vyavahārah."

(3) Sarkar p.14.

(4) For instance, Vāchspati Miśra wrote separately the Vivādachintāmaṇi and the Vyavahārachintāmaṇi.

(5) Kau.1.1; Manu VIII.4-7; Na.Smr. & Na.Sam.1.9; 1.16-19; Kātyāyana cited in Vi.Mi.223 etc.

history.⁽¹⁾ The six auxiliary sciences of the Vedas consist of the science of orthography and orthoepy, the rules about the performance of sacrifices, grammar, etymology, prosody and astronomy.⁽²⁾ In fact these represent not the sphere (sthāna) but the means of ascertaining dharma. Therefore Manu at one place mentions that the smṛiti themselves are the dharmasāstra.⁽³⁾

The sources of the dharma are different from the means of ascertaining it, and the sources of the positive Hindu law have been admittedly stated to be three viz. the śruti i.e. the Vedas, the smṛitis i.e. the metrical codes of law, and the immemorial and approved customs.⁽⁴⁾ However, the Courts of law recognise the following as the sources of Hindu law, namely, the śruti, smṛitis,

- (1) Yaj.I.3: "Purāṇanyāyamīmāṃsādharmasāstrāṅgamiśritāḥ/ Vedāḥ sthānāni vidyānām dharmasya cha chaturdaśa// Sarkar on p.2 translates the word 'sthānāni' as 'sources' but about the 'vedāṅgas' he says on p.15 "These, however, cannot be regarded as sources of law." From the comments of Vijñāneśvara it is clear that they all together are the means of attaining the different lore and the knowledge of the dharma. Though the four vedāṅgas viz. śikṣā, kalpa, chhandas and jyotiṣa are practically useless as regards the knowledge of vyavahāra, vyākaraṇa and nirukta are not, as they are often resorted to by the commentators. For resort to etymology see infra pp.

For resort to grammar see infra p. It is interesting to note that the famous commentary of Bālabhaṭṭa contains references to 93 sutras of Paṇini only in the Vyavahārādhyaya. The same part contains references to 54 nyāyas or the Mīmāṃsā illustrative maxims of interpretation. Mayne on p.39 says that the Mimamsa rules of interpretation "are of doubtful authority in the present day administration of Hindu law." But there is no reason why they should not be resorted to for the purpose of determining a point not so far covered by any of the smṛitis or commentaries. They have often been resorted to by some of the eminent judges - see Chunilal v. Surjaram, Bhimacharya v. Ramacharya, Bai Parson v. Bai Somli, Meenakshi v. Muniandi, Gangadhar v. Hiralal, Narayan v. Laxman infra pp.457, 437, 457, 426, 452-53, and 425 respectively.

- (2) For vedāṅgas see Ganganatha Jha: Pūrva-Mīmāṃsā in its Sources (1942) Vol.I.pp.218-19. For a reference to vedāṅgas see Manu III.185. For a detailed description of Vedāṅgas see Indian Wisdom pp.155-194
 (3) Manu II.10; see also Mit.on Yaj.I.3. [Max Müller p.108 and onwards.
 (4) Manu II.12; Yaj.I.7.

commentaries, immemorial customs, judicial decisions and statutes.⁽¹⁾

Although the Śruti or the Vedic literature is traditionally supposed to be the fountain-head of all knowledge and also of dharma, it is admitted on all hands that they do not contain much material concerning positive law. The smṛitis consist of the records of recollection and they are supposed to have been reproduced by the sages who were considered to be the repositories of the revealed law. The smṛitis may be taken loosely to include works of all the sages who were known as the compilers of the dharmaśāstra and the famous smṛiti of Yājñavalkya mentions a list of twenty sages ^{including those} who wrote simply aphorisms on the dharmaśāstra as well as those who wrote metrical treatises on it.⁽²⁾ Vijñāneśvara says that the list is by no means exhaustive and that the sages like Baudhāyana, etc. are also to be included in the list of the dharmaśāstrakāras mentioned by Yājñavalkya.⁽³⁾ Some scholars include also purāṇas in the term smṛitis.⁽⁴⁾ The original or the old purāṇas appear to have been eighteen. They were added to by many other upa-purāṇas but an eminent scholar like ^{Sarkar} Golapchandra [^] denounces these latter as spurious works.⁽⁵⁾ The rules of these smṛitis are often in conflict with each other, and sometimes

(1) For statutes see Mayne pp.72-73. But against judicial decisions being an independent source of law see Mayne p.19. But as against this view see The Changing Law p.45 referred to infra p. 17. Sarkar says that the principles of stare decisis and of communis error facit jus should not be resorted to in ascertaining Hindu law in India - Sarkar pp. 62-66.

(2) Yaj.I.4-5.

(3) "Neyam parisankhyā kintu pradarśanārthametad. Ato Baudhāyanāderapi dharmaśāstratvamaviruddham. Eteṣāṃ pratyekaṃ prāmāṇye'pi sākāṅkṣāṇāmākāṅkṣāparipūrāṇamanyataḥ kriyate, virodhe vikalpaḥ." - Mit.on Yaj.I.4-5.

(4) See, for instance, Mayne p.20.

(5) Sarkar p.37.

at least apparently, a statement in a smṛiti at one place is in conflict with a statement in the same smṛiti at another place. The probable explanation of such a wide divergence amongst them is that, with the exception perhaps of the Manusmṛiti, each smṛiti was of local application only.⁽¹⁾ According to Mīmāṃsā the authority of a smṛiti lies in a forgotten śruti upon which the former is presumed to have been based,⁽²⁾ and any smṛiti which is proved not to have been based upon the Śruti but upon fabrication etc. is unauthoritative.⁽³⁾ A smṛiti is also considered to be unauthoritative if it is in conflict with the Śruti.⁽⁴⁾

In determining the meaning and intention of the śāstric injunctions the Mīmāṃsā proceeds upon the following axioms:

(1) Sārthakṛatā : Every word and sentence has some meaning and purpose.

(2) Lāghava : When one rule or proposition would suffice, more should not be assumed.⁽⁵⁾

(3) Arthikatva : A double meaning should not be ascribed to a word or sentence occurring at one and the same place.⁽⁶⁾

(4) Guṇapradhānatva : If a word or sentence which, on the face of it, purports to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or altogether disregarded.

(1) Mayne pp.20-21.

(2) K.L.Sarkar : The Mimamsa Rules of Interpretation pp.74, 227 and 231; Jai.Su.I.3.1-2.

(3) Jai.Su.I.3.4.

(4) K.L.Sarkar pp.74, 227 and 233-35.

(5) For lāghava see infra pp.93, 392-93.

(6) For arthikatva see infra pp.387, 389, 394, 427, 437. See also p.250

(5) *Sāmañjasya* : Contradiction between words or sentences is not to be presumed where it is possible to reconcile them.

(6) *Vikalpa* : Where there is a irreconcilable contradiction between the two injunctions either may be adopted at option.⁽¹⁾

The general principles of interpretation are known as *śruti*, *linga*, *vākya*, *prakaraṇa*, *sthāna* and *samākhyā*, and represent rules such as the express meaning of a word or a sentence is to be preferred to its secondary or suggestive meaning etc.⁽²⁾ They are not very often resorted to by the commentators and we need not discuss them at great length.⁽³⁾

From amongst the general principles of the application of texts the following two must be mentioned as they are often referred to by the commentators.⁽⁴⁾

(1) First principle is that of distinguishing between the obligatory texts on the one hand and the quasi-obligatory or non-obligatory texts on the other. The Vedas consist of five classes of texts, namely, *vidhi*, *niṣedha*, *arthavāda*, *nāmadheya*, and *mantra*.⁽⁵⁾ *Vidhi* is that which enjoins a person to do a certain thing.⁽⁶⁾

Niṣedha denotes an order of total prohibition. *Arthavāda* consists of

(1) See K.Sarkar pp.78-98.

(2) *Jai.Su.III.3.14*: "*Śrutilingavākyaaprakaraṇasthānasamākhyānām samavāye pāraḍaurbalyam arthaviprakarṣāt*." See K.Sarkar 70-72, 110-155. For an excellent utilisation of these principles see Śaṅkara's *bhāṣya* on the *Brahmasūtras* (first *pāda* of the first *adhyāya*).

(3) K.Sarkar, however, gives some illustrations of the use of these principles by the *dharmaśāstra* commentators. On p.165 he argues that concerning succession to *strīdhana* *Jīmūta* resorts to the superiority of *linga* over *vākya* and interprets *Yaj.II.45* with the help of *Manu IX.196-97*. See *Da.Bha.4.2.24-28* infra pp.392-93

(4) For these see K.Sarkar p.73.

(5) *Ibid* p.170.

(6) *Ibid* p.39.

an explanatory statement of a vidhi or niṣedha.⁽¹⁾ Nāmadheya (lit. nomenclature) is that which is apparently like a vidhi but is not to be given the imperative force of a vidhi as that would tend to defeat some basic principle or purpose of the Śāstra.⁽²⁾ The vidhis are divided into two classes, namely, kratvartha vidhis and puruṣārtha vidhis. The former represent rules breach of which vitiates the sacrifice in which they are supposed to be followed whereas the latter are rules breach of which attaches a moral guilt to the person who does not observe them but does not vitiate the sacrifice.⁽³⁾ As laying down rules for the performance of sacrifices in accordance with the rules of the Śāstra is the main purpose of the Pūrvamīmāṃsā the former denote rules of positive law whereas the latter denote moral or non-obligatory rules.⁽⁴⁾

An arthavāda is an explanatory clause which supports a vidhi or niṣedha by resorting to an allegory, parable, fable, a popular reason etc. Being merely of the nature of an explanatory clause it is treated as a non-obligatory rule.⁽⁶⁾ A niṣedha is treated as an obligatory prohibition whereas a nāmadheya is considered as a non-obligatory injunction.⁽⁷⁾

Addition to p.11 note no.3 :

See also Dr. J.D.M.Derrett : The criteria for distinguishing between legal and religious commands in the Dharmasastra, A.I.R.1953 Journal pp.52-62.

(6) K.Sarkar pp.171-77 wherein he discusses the purport of the Vidhivannigadādhikaraṇa (Jai.Su.I.2.19-23) and the Hetuvannigadādhikaraṇa (Jai.Su.I.2.26-29). For arthavāda see infra pp. 372, 381 and 384.

(7) K.Sarkar pp.177-79.

(2) Second principle is that of 'atidesa' whereby rules applicable to certain persons or ^a set of circumstances are, by analogy, made applicable to other persons, or set of circumstances etc.⁽¹⁾ This is how in positive law any of the secondary sons of a male assumes the duties and acquires the rights of his legitimate son.

The smṛitis were followed by the commentaries which try to interpret the smṛitis with the help of the above-mentioned rules and apparently resolve the conflict amongst the different smṛitis.⁽²⁾ As regards the divergence, however, what was true of the smṛitis was true a fortiori of the commentaries. Although all the commentators and digest-writers profess only to interpret the commandments of the ancient sages, nominal authors of the smṛitis, it is obvious that each one of the former has some preconceived definite idea about the system of law which he wants to propound with the help of the convenient smṛiti texts. To serve this purpose he accepts the favourable texts of the smṛitis, neglects or ignores the unfavourable ones and where a particular text is too important to be easily avoided he accepts a different reading which changes the meaning of the text. However, he cannot lose sight of the principle of 'sārthakyatā' which often

(1) Ibid pp.200-207; Bhattacharya's Commentaries on Hindu Law p.71 wherein he refers to the commentary of Śrīkrishṇa on Da.Bha. 3.2.29-33. For the application of this principle to strīdhana see infra pp.398,402,436,452 and 457

(2) For instance see Vijñāneśvara's comments on Yaj.II.4-5 referred to supra p. 8. Even at present, for instance, an eminent judge and Hindu law scholar, like Mr. Justice Gujendragadkar unconsciously followed the principles of 'sārthakyatā' and 'sāmañ-jasya' in Gajanan v. Pandurang, and, in an enthusiasm to prove that some of the old śāstric texts are well in conformity with the modern conditions of the Hindu society, has done injustice to the śāstrakāras themselves - see infra pp.286-291. So it is not very surprising that having openly accepted these two principles the commentators often find themselves in an uncomfortable position. See below.

creates difficulties in his way. Therefore while keeping the balance between the axioms of interpretation and the system which he wants to propound a commentator is often found to be saying something which is illogical, unconvincing, ambiguous⁽¹⁾ and sometimes even self-contradictory.⁽²⁾

The modern Courts regard the commentaries as having more weight and importance than the smritis although the former profess only to follow the latter. The position though apparently an anomalous one is nevertheless a legal one and the practical relation between the smritis and the commentaries was unequivocally laid down by their Lordships of the Privy Council in the following words:

"The remoter sources of the Hindu law are common to all the different schools. The process by which these schools have been developed seems to have been of this kind. Works universally or generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose... The duty therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal and has there been sanctioned by usage."⁽³⁾

In short, in the eyes of the law the commentaries and digests have superseded the smritis and form the main bulk of the basic sources of Hindu law.

It is also important to see the reasons why the commentaries have been held by the Courts to have gained such a dominant position

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- (1) For such statements see infra pp.310, 340, 345, 348, 385, 389, 394, 397-98, 401
 (2) For self-contradictory statements see infra pp.107, 112-13, 214, 217-18, 237, 256, 324, 337, 342, 347, 404.
 (3) Collector of Madura v. Mootoo Ramalinga (1868) 12 M.I.A.396 at pp.435-36.

among the sources of Hindu law. One reason is that the commentators frequently extended the rules of the smṛitis to their logical conclusion, and brought about a more clear-cut and detailed system of law for practical administration by filling in the lacunae left in the actual words of the smṛitis.

But a more important reason lies in the fact that they incorporated in their systems of law the usages and the customs of the people in general and sometimes even brushed aside the law of the smṛitis in order to fit the custom of their respective countries into its proper place in their treatises.⁽¹⁾ Most of the smṛitis declare that the usage of the country is to be regarded as most important.⁽²⁾ In furtherance to this position some of the commentators maintain that the science of law is like grammar, and it embodies into the written form what already exists in the form of an accepted usage.⁽³⁾

It is through the incorporation of this usage that the commentaries gained their worth. Having observed in a very early case that the Mitākṣarā "subordinates in more than one place the language of the texts to custom and approved usage"⁽⁴⁾ their Lordships of the Judicial Committee emphatically laid down later on that

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- (1) For such instances see *infra* pp. 156, 270, 346, 399, 405, 491. ^{See also *Codification in British India*, T.L.L. (1912) p. 341.}
- (2) *Infra*.
- (3) Referring to partition amongst reunited brothers Nīlakaṇṭha denies larger share to the eldest son and remarks: "Āchār-o'pyevam. Tenāchāramūlakatve'sya vachasah sambhavati tadvir-uddhaśrutikalpanamanyāyyam. Vyavahārasāstrasya vyākaraṇavat prāyeṇāchāramūlakatvāchchēti pare." - Vya.Ma.146. See also Ma.Ra.referred to *infra* p.246. For the Mayūkha embodying pre-existing custom see Chundika Baksh v. Muna Kuar (1903) 29 I.A. 70; Jawahir Lal v. Jarau Lal (1924) 46 All.192.
- (4) Bhya Ram v. Bhyah Ugar (1870) 13 M.I.A.373 at 390.

"in the event of conflict between the ancient text-writers and the commentators, the opinion of the latter must be accepted."⁽¹⁾ Confirming their reasoning and opinion their Lordships further expressed that "the commentators, while professing to interpret the law as laid down in the smṛitis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and it is the opinion of the commentators which prevails in the provinces where their authority is recognised."⁽²⁾

After this brief discussion of the commentaries it is necessary to refer to usage which perhaps forms the most important source of Hindu law and to which even the commentaries owe their chief importance. It is probably the divergence in usage that produced the divergence amongst the smṛitis and the commentaries as well. The Śāstra had always recognised the importance of usage.⁽³⁾ But according to Mīmāṃsā and the earlier authors of the dharmaśāstra the validity of a particular usage depended upon whether it was in consonance with the precepts of the Śāstra or not.⁽⁴⁾ But the restriction of 'being not opposed to the Śāstra' seems to have dwindled into insignificance in course of time, and the later authors boldly say that even if a particular usage is in contravention of the injunction of the Śāstra it is to be followed and may be recognised as positive

(1) Atmaram v. Bajirao (1935) 52 I.A.139 at p.143.

(2) Ibid.

(3) See for instance Manu VIII.3 (Pratyahaṃ deśadṛiṣṭaiścha ...etc); Manu VIII.41 (Jātijānapadān dharmān ...etc.).

(4) See Jai.Su.I.iii.5-6 (the padārthaprābalyādhikaraṇa) and the comments of Śabara and Kumārila discussed in K.Sarkar pp.141-49. See also Gau.Su.11.22 : "Deśajātikuladharmāśchāmnāyairaviruddhāḥ pramāṇam." (This is Gau.Su.11.22 in Haradatta's Mitākṣarā). See also the comments of Maskari and Haradatta on the above sūtra and of Medhātithi on Manu VIII.3.

law. Yājñavalkya in fact lays down that the orders of the Śāstra are ^{to be} not followed if they are detested by the general public.⁽¹⁾ The whole idea of 'kalivarjyas'⁽²⁾ (things enjoined by the Śāstra but not to be practised in the Kali age) seems to have been based on this principle of abhorrence of the people (lokavidveṣa). Bṛihaspati recognised as valid several customs which were opposed to the Śāstra and recommended that the people who followed their respective ⁽³⁾ punished even in contravention of the śāstric rules, ought not to be punished.⁽³⁾

Yājñavalkya ordains that the king who conquers a new country should, in governing that country, follow the laws and the customs only of that country.⁽⁴⁾ As it was the duty of the king to administer justice in the country according to the local customary usage there can be little doubt that as regards positive law customs always superseded the smṛitis or the śāstric law.⁽⁵⁾

The next most important source of Hindu law is the judicial decisions. Their Lordships of the Privy Council always adhered in

(1) Waj.I.156. Vijñāneśvara adds: "Dharmyaṃ vihitamapi lokavid-
viṣṭam lokābhiśastijananam madhuparke govadhādikam nācharet."
With the help of the above verse he contradicts the authority
of the precept laid down in Yaj.I.109 and, while denying a greater
share to the eldest son as laid down in the smṛitis, discusses
at length the principle laid down by Yaj.I.156 - see Mit.on Yaj.
II.117. See also Manu IV.176 (Parityajedarthakāmau yau syātām
dharmavarjitau / Dharmaṃ chāpyasukhodarkam lokavikṛiṣṭameva cha//

(2) For this concept of 'kalivarjyas' see infra pp.41-42.

(3) Such customs collected by Bṛihaspati may be noted in detail:

"Uduhyate dākṣiṇātyaṁ mātulasya sutā dvijaiḥ /
Madhyadeśe Karmakarāḥ Śilpinaścha gavāśinaḥ //
Matsyādāścha narāḥ pūrve vyabhichāraratāḥ striyaḥ /
Uttare madyapā nāryaḥ spṛiśyā nṛīnām rajasvalāḥ //
Khasajātāḥ pragrihṇanti bhrātṛibhāryāmabhartrikāḥ /
Anena karmanā naite prāyaścittadamārhakāḥ // - Bṛihaspati
quoted in Vi.Mi.22 and other treatises.

(4) Yaj.I.343 (Yasmindeśe ya āchāra ...etc.)

(5) For customary laws see infra chapter IV.

principle to the common law rule that the Court merely expounds the law and does not legislate. But the function of interpretation sometimes becomes so important and recurrent that it tends to approach the function of legislation.⁽¹⁾ This has particularly been true of Hindu law, wherein but for the continuous flow of judicial decisions a development of a uniform or at least a harmonious system would have remained utterly beyond expectation. Their Lordships of the Privy Council have, in some cases, altered the dharmaśāstra law and in others have tried to supplement the same by applying rules of analogy to fill in the gaps left by the śāstric writers.⁽²⁾

However, the principle of following the ratio of the previous decisions was perhaps utterly unknown to Hindu law and was introduced into its field by the British administration. But a distinction ought to be made between a ratio decidendi and the vyavasthā of a pandit. The ratio decidendi denotes a process of reasoning whereby a particular provision of law is held applicable to a particular set of facts in any case. The ratio of a previous case is applicable to all the subsequent cases wherein the facts or the data is the same. On the other hand, vyavasthā is an opinion given by a pandit in a particular case after considering not only the law on the particular point involved in that case but also such other things as caste, community, usages etc. of the parties concerned and it may be based on equitable as well as legal consideration. Thus in consonance with its etymological meaning a vyavasthā is an arrangement or a decision which is peculiar to a particular case and might not be

(1) See Sir Alfred Denning : The Changing Law p.45.

(2) See infra.

applicable to an apparently similar case. Formerly the decisions given by the Sudder Courts of the East India Company were usually based on the vyavasthās given by the pandits of the Courts. Later on, however, the Courts themselves tried to interpret the dharmasāstra texts, meeting with general success though leaving certain mistakes which were quickly perpetuated on account of the common law rule of stare decisis. Hindu law is nowadays interpreted in the light of rationes and dicta of the opinions given by their Lordships of the Judicial Committee and the decisions of the different High Courts in India.

The enactments passed by the legislature form an additional source of Hindu law.⁽¹⁾ The process of modification of Hindu law which began in the early nineteenth century reached almost its pinnacle in the form of the four recent enactments passed by the Indian parliament⁽²⁾ and these latter appear to have almost entirely abrogated the old Hindu law. For the purpose of this thesis, however, Hindu law will first be ascertained as it existed before these recent enactments, and the radical changes brought about by these enactments will be measured in the light of the position of Hindu law as it stood before.

The principles of justice, equity and good conscience which are so well known today were not utterly foreign to the domain

(1) For enactments which have amended Hindu law from time to time see *infra* p. 637.

(2) For these see *infra* p. 638.

of Hindu law⁽¹⁾ though it must be added that the concept of an equitable decision in Hindu law is different from the one in English law wherein the development of equity depended upon reasons peculiar to themselves.

Reference may be made also to the text-books writers and research scholars whose works - though they were never admitted as sources of Hindu law - have always exercised a considerable influence on the development of Hindu law. In the early days works of Sir William Macnaghten and of Sir Thomas Strange could introduce big changes in the movement of Hindu law.⁽²⁾ Even in modern times it is observed that the works which are generally considered to be standard are often relied upon by the practitioners and also by the Courts and the latter sometimes give a decision on a particular point merely relying upon the position of the law as stated in a particular text-book and without referring to any previous case or text of Hindu law.⁽²⁾ The opinion of a well-known research scholar such as G.D.Banerjee or R.Sarvadhikari is often followed by the Courts upon points not openly covered either by texts or decisions.⁽⁴⁾ Moreover the text-book

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- (1) See Mayne pp.80-81, Gupte p.23. However, Mayne says that 'yukti' referred to by Nārada and Brihaspati means 'equity and reason', which does not appear to be correct. See Na.Smr.1.40 & Na.Sam.1.34, and the two verses of Brihaspati cited in Apa.on Yaj.II.1. The comments of Asahāya and Bhavasvāmi upon Nārada's verse as well as the illustration of Māṇḍavya ṛṣi given by Brihaspati himself suggest that 'yukti' means 'subtle reasoning' and not 'equity' known to English law.
- (2) For striking instances in which Macnaghten was followed see infra pp.123,446,411.
- (3) See, for instance, Emperor v. Sat Narain A.I.R.1931 All.265 infra p.268 wherein the decision was given only on the authority of Mulla's Hindu law.
- (4) See, for instance, Kanakammal v. Ananthamati (1914)37 Mad.293; Chandulal v. Bai Kadhi I.L.R.1939 Bom.97; Bhadu v. Gokul A.I.R.1948 Cal.240 infra pp.460,466,480, wherein the decision was given only on the authority of Banerjee. See also Munia v. Puran,

(continued on the next page.)

writers and the scholars may be said to be highly responsible for the development of Hindu law in as much as they may impress the legislature as well as ^{the} public in general with their opinion as to what the law ought to have been in the past, or ought to be at present or in future. This common practice of relying on the text-book writers is often in the interest of clients since it saves judicial time, but it may be submitted that occasionally the adopting of an author's words in a context which he perhaps did not precisely anticipate leads to just that element of potential confusion which a first-hand resort to the authorities might have avoided with profit. Moreover even leading authors like Sir William Macnaghten, Mayne, Sarkar and Banerjee have made several inaccurate, ⁽¹⁾ and sometimes even self-contradictory ⁽²⁾ statements which have unfortunately been followed in some cases by the Courts. ⁽³⁾

Arising out of our earlier discussion of the smritis, the commentaries and custom a question arises as to whether Hindu law as it is applied today was ever applied to the people in general in India by any authority before the British regime. Even a superficial glance at the customs of the different provinces collected in works such as those of Borradaile, Steele, Thurston etc. ⁽⁴⁾ immediately convinces us that all of them could not come within the scope of a single

(1883)5 All.310 F.B. and Maiyan Dalip v. Sri Mohun I.L.R.1945 All.315 infra pp.268,439, wherein decision was given without referring to any Sanskrit text or judicial precedent.

- (1) For incorrect statements of the text-book writers and scholars see infra pp.89, 192, 260, 258-61, 273-79, 285, 404, 439, 487, 536, 543, 558. For places where Banerjee's statements have been either wrong or inadequate see infra pp.77, 98-99, 242, 364, 380, 384, 413, 439, 481, 487, 492, 493, 575.
- (2) For self-contradictory statements of such authors see infra pp.192, 259, 260, 543.
- (3) See infra pp.123, 192, 273-79, 285, 411, 446 etc.
- (4) For these works see infra chapter V.

system: the differences between some of the customs were extreme. The British who, with the help of the pundits, made themselves acquainted with the indigenous law were probably misled by the idea - perhaps ingeniously suggested by the pundits themselves - that the whole of India was governed by the written texts of the śāstric law, and contributed to that misconception by their own ideas as to the schools of law. The whole process now seems utterly illogical and indeed scarcely intelligible in view of the fact that in many parts of India and in many communities all over India the śāstric law was never resorted to for the purpose of deciding cases, which were usually decided according to the usages of the different tracts and communities with which the local Courts were evidently well acquainted. In some of the provinces such as Madras and the North West Frontier Province the śāstric texts were never followed and perhaps never known.⁽¹⁾ The Sudder Court of the North West Province had to remand many cases to the lower Courts; because the latter did not know the new rule that Hindu law was to be applied to a case wherein both the parties were Hindus. In the South learned authors like Ellis and Nelson found that the śāstric law was unknown to the masses perhaps with the exception of the Brahmins and that the myriad systems of law as administered previous to the British regime were entirely different from the one which came into general application for the first time during that period. But such authors could not stem the tide of

(1) Stating that the authority of the Mitākṣarā was never recognised as binding in the Śāstra itself and referring to the struggle between the Āryas and the Draviḍas, their Lordships of the Madras High Court observed: "It was the East India Company's Courts that held for the first time that the laws contained in the ancient sruthis and Smrithis were applicable to all Hindus in Southern India in the absence of a custom or customary law govern-

successive decisions with the help of which what was originally a misconception gradually crystalised into a recognised tradition.

However, the results of such a mistake were not wholly detrimental to the Hindu society and perhaps the most salutary effect of this mistake is the formation of what would otherwise have been impossible, viz. a fairly harmonious system of Hindu law as it is understood today. The British, even if they borrowed from the Bengal pundits their misconception that the written śāstric law was applicable to all Hindus in the absence of a custom to the contrary, pursued honestly and meticulously their duty as they conceived it. British scholars commencing with Sir William Jones and Colebrooke were responsible for the publication of the translations of many Sanskrit books on law which, but for the attempts of these scholars, might never have come before the eyes of the world. At all events it is too late to criticise the basic mistake upon which the Anglo-Indian Hindu law is founded.

The difference between the provisions of the different commentaries gave rise to what is known in modern Hindu law as 'schools' of Hindu law. The terms 'schools' has been somewhat loosely used in this field since Colebrooke first used it.⁽¹⁾ In fact there appear to be only two schools of Hindu law, namely, the Mitākṣarā school and the Dāyabhāga school. The difference between these schools is radical since in opposition to Jīmūtavāhana, the author of the Dāyabhāga, Vijñāneśvara, the author of the Mitākṣarā,

"ring any class of people." - Viswanatha v. Doraiswami (1925)

48 Mad.944 at 947-48.

(1) Mayne p.54.

maintains that property has a secular origin, that the doctrine of spiritual efficacy has no application whatsoever to succession and inheritance, and that the male issue of a male up to the third generation get a right by birth in the coparcenary property. The other 'schools' known to modern Hindu law are the Benares school, the Bombay school, the Southern school and the Mithila school. These appear to be nothing more than the sub-divisions of the Mitākṣarā school but the notion that these 'schools' exist has become so deep-rooted in the case-law that without taking a historical survey as to how these 'schools' arose - a discussion which really falls outside the scope of the present work - Hindu law will be ascertained in this thesis upon an assumption that these 'schools' do exist.⁽¹⁾

Besides the Mitākṣarā the main authorities of these schools are as follows:-

The Benares school : the Vīramitrodaya and the Vivādatāṇḍava.

The Southern school : the Smṛitichandrikā, the Parāśaramādhavīya,

The Bombay school : the Vyavahāranirṇaya and the Sarasvatīvilāsa.
the Vyavahāramayūkha.

The Mithila school : the Kṛityakalpataru, the Madanapārijāta, the Vivādaratnākara, the Vivādachintāmaṇi and the Vivādachandra.

The authorities of the Dāyabhāga or the Bengal school are the Dāyabhāga, the Dāyatatva and the Dāyakramasaṅgraha. Besides the above-mentioned authorities there are several others which would occasionally be referred to in the forthcoming part of the thesis. Even during the British regime in India several Sanskrit works on law

(1) For schools of law see Mayne pp.54-58, Sarkar pp. 37-40, Bhattachārya pp.47-50, Trevelyan pp.13-22, Gupte pp.27-38 etc.

were composed by the pundits at the instance of British scholars like Colebrooke, Sir William Jones etc. The most outstanding and colossal amongst these works are the Vivādabhaṅgārṇava (translated by Colebrooke), the Vivādārṇavasetu (translated by Halhed), the Vivādasārārṇava and the Vyavahārasiddhāntapīyūṣa. The first one of these became well-known as Colebrooke's digest and was often quoted as authority in the Courts. But there is no evidence - though this aspect of the matter has never been judicially investigated, so far as is known - that the Courts of the East India Company or subsequently the Supreme Court of Judicature at Calcutta or later still the High Courts in India ever accepted the possibility of a further internal development of the Śāstra on traditional lines: the Court pundits never assumed to innovate but merely to interpret and their authorities were invariably more or less antiquated and thus comfortably beyond suspicion. However, it may be submitted that the presumption of an incorporation of usage which gave the previous commentaries their own worth cannot arise in the case of the commentaries written during the British Regime in India. Moreover no single author, however learned he might have been, could, after the introduction of the British regime in India, usurp the function of legislature by professing to change, on his own authority, the already established rules of the Śāstra.

Even after one has noted the various sources and schools of Hindu law and has accepted, whether correctly or not, the traditional line of approach, namely, to interpret Hindu law as

consisting of the Śāstra supplemented and corrected by the judicial decisions and customs derogating from the former, one cannot at once grasp the bewildering diversity in the decisions on Hindu law and the vacillations that took place in the law even of a single 'school'. It is essential to understand the reasons for the mistakes, inaccuracies or the incongruities in the decisions of the Courts relating to stridhana in particular and these may be summarised as follows:-

(1) Judges' ignorance of the Sanskrit language : The first and the foremost of these reasons was the judges' ignorance of Sanskrit in which all the important treatises on Hindu law were written. A long interval separated the period during which it was admitted that the śāstric law was to be applied to all Hindus and the time when many of the important Sanskrit books on law were translated and published; it was during this period which may be called ^{the} formulatory period of the Hindu law that their Lordships of the Privy Council and of the different High Courts in India gave important decisions without having any opportunity to have full access to all the material concerning the point involved.

It is noteworthy that the whole text even of the Mitākṣarā was not before their Lordships of the Judicial committee when they laid down in Thakore Dayhee v. Rai Baluk Ram⁽¹⁾ the fundamental principle, namely, immovable property inherited by a widow from her husband is not her strīdhana according to the Benares School. The decision in the important case of Chotay Lal v.

(1) (1866) 11 M.I.A. 139 see infra pp. 132-33.

Chunnoo Lal⁽¹⁾ was given without considering or even referring to the Viramitrodaya which later on came to be known as a very important authority of the Benares school.⁽²⁾ Confirming the decision of the Bombay High Court in Vinayak v. Lakshmibai⁽³⁾ their Lordships of the Privy Council referred to the Mayūkha, the leading authority in Bombay school, as "a book with which we are not familiar here, but which seems to be well-known in Bombay and to be considered and treated as authority there."⁽⁴⁾

The position of the Sudder Courts in India was by no means better; in the beginning they had to depend on pundits who gave their opinion based upon very doubtful authority. Borradaile in his introduction to his Reports of the S.D.A. of Bombay stated that very few works except the Manusmṛiti, the Mitākṣarā and the Mayūkha were ever known and the pundits appointed to give advice on legal points used to give it upon the basis of a particular work not possessed by many, and that they were usually disinclined to part with it even for the purpose of being copied down. He adds, "In one instance the Sadar Udalut Shastree admitted that Parisiṣṭhu (Parisiṣṭa i.e. an ~~appendix~~) was the authority for the exposition, but as he alone possessed the work, there is no knowing yet how far it was true in other cases."

(1) (1879) 6 I.A. 15 see infra p.141

(2) Mayne pp. 45-46, Sarkar pp. 39, Bhattacharya pp. 49, Gupte pp. 33, Trevelyan (1929) pp. 17-18.

(3) (1861) 1 B.H.C.R. 117.

(4) Venayack v. Luxoomeebaee (a864) 3 W.R. (P.C.) 41.

What was true of the judges was true mutatis mutandis of the lawyers who argued before the former. Perhaps with the illustrious exceptions like Mayne and Cowell counsel never read in full the original Sanskrit text or its translation and was forced to proceed upon his general knowledge concerning the subject as it was expounded in the early text-books. Even as late as in *Balwant Rao v. Baji Rao*⁽¹⁾ we find Sir Erle Richards arguing before the Judicial Committee that the *Mayūkha* is only a commentary on the *Mitākṣarā* and hence subservient to the latter.

Even when some of the Sanskrit books were translated in English and the judges in the later stage of the development of Hindu law started possessing some knowledge of the Sanskrit language it was not easy for such judges to understand the meaning correctly, as the Sanskrit language itself is very difficult and the intricacy of the language is further worsened by the style of some of the commentators which gives rise to enigmatical, ambiguous or equivocal expressions. Brett J. in *Debi Prosanno v. Sarat Shashi*⁽²⁾ observed : " The text of the ancient authors, however, do not yield readily to those methods of construction which we are able to adopt in dealing with the books of modern date. The style is often involved. No rules of punctuation are observed, and matters are introduced in parenthesis both in passages and in sections of the works without any apparent system or rule."⁽³⁾ While this *cri de coeur* would not have

(1) *Balwant Rao v. Baji Rao* (1920) 48 Cal. 30 (P.C.). The editor of the

(2) (1909) 36 Cal. 87.

(3) *Ibid.* at p. 100.

Vivādatāṇḍava (Baroda, 1901) in his preface p.1 says :
" It is well-known that Kamalākṛatābhaṭṭa is the author of the treatise known as the *Vyavahāramayūkha* and it is said that this author has composed several other *Mayūkhās*."

escaped the lips of a judge adequately trained in the śāstric techniques it was nevertheless a fair comment upon the meandering methods of the Hindu jurists. The difficulty was further augmented by wrong translations⁽¹⁾ of, and misprints⁽²⁾ in, the original texts. There is no wonder therefore^{that} in the case-law on strīdhana we find a host of decisions in which the śāstric provisions to the contrary were either not considered, or misinterpreted.⁽³⁾

(II) Reliance on Macnaghten and other text-book writers : As in the beginning their Lordships of the Privy Council were almost incapable of taking recourse to the original Sanskrit authorities they were compelled to rely on text-books writers like Macnaghten and Strange. But being unable to examine the basis^{of} Macnaghten's statements their Lordships unintentionally approved and followed also his mistakes.⁽⁴⁾ This tendency of the Courts to rely upon a standard text-book has lingered behind till the present day and has resulted in many an incorrect decision.⁽⁵⁾

(III) Application of the law of the Bengal school to that of the Mitākṣarā school : In the beginning the Calcutta High Court had to deal with the law of the three 'schools', namely, the Bengal school, the Benares school and the Mithila school. Consequently their

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- (1) For instances of incorrect translations see infra pp. 78, 85, 98, 249, 307, 384, 445, 485-86. See also Theodor Goldstucker: On the deficiencies in the present administration of Hindu law infra p. 445.
 (2) For some misprints pointed out in this thesis see infra pp. 75, 115, 249, 250, 311, 378, 380, 390, 453, 539. and obiter dicta
 (3) For some of the important decisions against the provisions of the śāstra see infra pp. 125-147, 169, 194, 266, 268, 271, 273-79, 285, 286, 286-291, 296-97, 298, 415-16, 421, 432-33, 462-65, 483-84, 491-93, 479-80,
 (4) See infra pp. 123, 411, 446. 554, 567-68.
 (5) See supra p. 268

Lordships of the same High Court were continuously, though perhaps unconsciously, superimposing the law of the Bengal school upon that of the Mitākṣarā sub-schools. This superimposition was quickly and unhesitatingly confirmed by their Lordships of the Privy Council because in the early stage of the development of Anglo-Indian Hindu law most of the members of the judicial Committee who were elevated from the Indian High Courts had their judicial experience in Bengal. The very first case in which their Lordships of the Calcutta High Court laid down clearly that immoveable property which a widow inherits from her husband is not her 'peculium', was decided upon an alleged passage in the Mitākṣarā which in fact forms a part of Śrīkrishṇa's commentary on the Dāyabhāga.⁽¹⁾ It may merely be stated at this stage that the decisions in which it was laid down that the property inherited by a widow from her husband is not her peculium or strīdhana were based upon this confusion between the law of the Bengal and the Mitākṣarā schools.⁽²⁾ The basic mistake was further enlarged by putting on a par property inherited by a widow and property inherited by any other female heir from any of her male or female relatives.⁽³⁾ The scope of the mistake was further widened by the Courts with the help of uncalled for analogies between property inherited by a female and property obtained by a woman on partition⁽⁴⁾

(1) Goburdhan v. Onoop (1865) 3 W.R. 140, see infra p. 127.

(2) Infra pp. 127-138.

(3) Infra pp. 145-146.

(4) Infra pp. 163-64.

or immoveable property given to a woman by her husband.⁽¹⁾

(IV) Inconsistency in the decisions : Although the common law rule of stare decisis was always accepted in principle it was not always followed in practice. The decisions even of their Lordships of the Privy Council on whether accumulations of income constitute strīdhana or not, were not necessarily consistent with each other.⁽²⁾ Their Lordships failed to evolve some common definite principle in cases wherein one of the parties claimed that property acquired by a woman by adverse possession was ^{her} strīdhana. In some such cases their Lordships of the Privy Council did not even refer to the precedents laid down by themselves.⁽³⁾ Concerning such decisions Page J. characteristically remarked, " It cannot be pretended, I think, that in the Privy Council the views which have been expressed from time to time are all consistent, or can wholly be reconciled."⁽⁴⁾ In Bhugwandeem v. Myna Baee⁽⁵⁾ their Lordships of the Privy Council termed as 'ambiguous' the passage in the Mitākṣarā wherein inherited property is included in strīdhana and rejected its authority,⁽⁶⁾ but in Chotay Lall v. Chunnoo Lall⁽⁷⁾ they admitted that the same passage clearly confers upon the widow or the daughter 'an entire

(1) Infra p. 167.

(2) Infra p. 172.

(3) Infra p. 184

(4) Sarat Chandra v. Charusila (1928) 55 Cal. 918 at 924. See also Rupabai v. Nokhesing A.I.R. 1940 Nag. 236; Lalsingh v. Vithal-singh A.I.R. 1950 Nag. 62 at 65 infra.

(5) (1867) 11 M.I.A. 487.

(6) Infra p. 134

(7) (1879) 6 I.A. 15 infra p. 143.

estate in land acquired by inheritance'.⁽¹⁾ Moreover their Lordships of the High Courts followed in several cases not only the exact decisions of their Lordships of the Privy Council but also the obiter dicta of the latter without examining the propriety of so doing. Their Lordships of the Allahabad High Court had to admit, "There have been recent and conspicuous instances of the danger of applying Privy Council decisions to points which they did not decide but which, in the language of Halsbury, seem to flow from them."⁽²⁾ Some of the decisions given by their Lordships of the High Courts were not consistent with the precedents decided by themselves. The way whereby their Lordships of the Madras High Court in one Full Bench case nearly overruled their own decision in a previous Full Bench case was, in the words of their Lordships of the Privy Council, "full of perplexity".⁽³⁾ As regards the point whether, in the absence of any evidence, property acquired by a woman by adverse possession should be treated as her strīdhana or not their Lordships of the Allahabad High Court have till this day been continuously oscillating between two views and ^{have} never thought of getting the matter settled by their own Full Bench.⁽⁴⁾ Their Lordships of the Bombay High Court have given ^{not only inconsistent decisions⁽⁵⁾} but even a self-contradictory decision.⁽⁶⁾ There is no wonder therefore that as regards certain controvertial points the law was always left in a speculative position.

(1) Infra p. 143

(2) Kali Charan v. Piari (1924) 46 All. 769 at pp. 771-72.

(3) Infra p. 171

(4) Infra pp. 185-86.

(5) Infra pp. 455.

(6) Infra p. 187.

(V) Inconsistency in principles of interpretation : It has already been stated that their Lordships of the Privy Council laid down in Collector of Madura v. Mootoo Ramlinga (1) that a commentator's interpretation of a smṛiti text is to be preferred to the text itself. But in Thakore Deyhee v. Rai Baluk Ram (2) and in Chotay Lal v. Chunoo Lal (3) their Lordships themselves went against this principle and preferred the smṛiti texts to the interpretation put upon them in the Mitākṣarā. The former case was no doubt decided before Collector of Madura's case but Chotay Lal's case was a later case and it is evident that their Lordships violated in that case the very principle which they vociferously laid down in a previous case and subsequently affirmed in almost every case. (4) Secondly, it is well-known that on the presumption that Nīlakaṇṭha incorporates into his treatise the customary law of his province (5), the authority of the Mayūkha has been held to be superior even to that of the Mitākṣarā in that part of the Bombay Province in which the Mayūkha is considered to be the most supreme authority. On the same principle one would have expected the authority of Jīmūta's followers to supersede the authority of Jīmūta himself. (6) Strangely enough, it has consistently been held that in the event any conflict between

(1) (1870) 13 M.I.A.396 supra p.13.

(2) (1866) 11 M.I.A.139.

(3) (1879) 6 I.A.15.

(4) Supra p.13.

(5) Supra p.14.

(6) See Acharyya's T.L.L.(1912) p.365.

the provisions of Jīmūta and those of his followers the authority of the former prevails over the latter.⁽¹⁾ Thirdly, it is no less anomalous that the Jainas and Bauddhas who were, in view of the Śāstra, completely unorthodox were held to be governed by the ordinary Hindu law right from the beginning,⁽²⁾ whereas at least for a long time dancing girls and degraded persons were in some cases considered to be outside the pale of the ordinary Hindu law because of ^{their} degradation,⁽³⁾ which arises only on account of the infringement of certain Śāstric rules.⁽⁴⁾ If challenging the very authority of the Vedas did not prevent the Jainas and the Bauddhas from being governed by the ordinary law it is difficult to see why the so-called degraded persons could not be governed by it.

(VI) Careless handling of customs and customary laws : Although custom is one of the most important sources of Hindu law the Courts always treated it with scant respect. In some cases customs were too readily asserted and assumed without any proof of their existence.⁽⁵⁾ There are also cases in which decisions were given against a well-known custom : the decisions in the Mayūkha cases that inherited property was strīdhana were all of this nature.⁽⁶⁾

(1) See infra p.476 for all such cases.

(2) Mayne p. 5 Gupte pp.10-11, See also Bhikubai v. Mani lal A.I.R. 1930 Bom. 517 and Jaiwanti v. Anandi A.I.R. 1938 Nag. 62 infra pp.148 and 417 wherein the authority of the Vardhamānanīti and the Bhadrabāhusamhitā was flatly rejected.

(3) See infra chapter V.

(4) Infra p. 529.

(5) Infra pp.428-29.

(6) Infra pp.151. In some cases recognised customs were set aside or not followed - see infra pp.158, 419, 463.

Moreover there was no standard measure as to the importance to be given to authors who have collected detailed information concerning customs and customary laws of a particular community or locality. In some cases the statements made by such authors were approved and followed without any further proof ⁽¹⁾ whereas in some others the Courts refused to recognise the authority of such authors unless they could adduce some first-hand evidence in favour of their statements. ⁽²⁾

Bearing these basic causes of confusion in mind we would not be dismayed by the complicated nature of the law of strīdhana as it stood before 1955 in India. After this succinct survey of the evolution and the nature of the modern Hindu law we shall now turn to the evolution of women's property in general and of strīdhana in particular.

(1) Stating that it is difficult to collect customs by judicial procedure West J. observed, " Mr. Borradaile's work, on the contrary, is a pre-constituted evidence. It is essentially useful....., where the point of issue is, which of the two opposite readings of Hindu law should be received as applicable to a particular locality now." *Navalram v. Nandikishore* (1861) 1 B.H.C.R. 209.

(2) See *Infra* pp.459, 562-63.

For a proper understanding of the nature of strīdhana some knowledge of the development of woman's property in general is essential as it affords a general background against which the concept of strīdhana became clear and distinct in the course of time. The concept of property is perhaps as difficult to define even today as it was a thousand years ago.⁽¹⁾ Nevertheless many Hindu jurists tried to analyse the nature of property in its abstract sense though their theories widely diverge from each other.⁽²⁾ However, the authors of the sūtras and smṛitis did not attempt to analyse the concept of property but, for the practical administration of law, they remained content with defining the modes of acquiring property.

Thus Gautama declares that inheritance, purchase, partition, seizure and finding are the modes of acquisition common to all.⁽³⁾ He also mentions acceptance (by way of gift etc.), conquering (a territory etc.) and earnings (by trade, labour etc.) as modes of acquisition peculiar to Brāhmaṇas, Kṣatriyas, and Vaiśyas ^{as well as} Sūdras respectively.⁽⁴⁾ Thus it is clear that from the beginning of the Hindu legal literature the acquirement of ownership depended inter alia upon the status of the acquirer. A particular section of the

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- (1) For an excellent survey of the nature of property amongst different primitive people of the world see E. Adamson Hoebel: *Man in the Primitive World* (1949) pp. 329-45.
- (2) See, for instance, Dr. J. D. M. Derrett: *An Indian Contribution to the Study of Property* B.S.O.A.S. 1956 p. 475 for the text of the *Svatvaṁvichāra*.
- (3) See Gau. 10.38 and comments of Vijñāneśvara on it in *Mit. on Yaj.* II.24. See also Dr. J. D. M. Derrett: *The Right to Earn in Ancient India*, *Journal of the Economic and Social History of the Orient* (1957) p. 66.
- (4) Gau. 10.39-40. Haradatta explains 'nirviṣṭam' as 'Karmanopāttam'.

society was thus privileged to acquire ownership in a particular mode whereas the other sections were denied it. It will have been shown how the female half of the society became, for the time being, an object of discrimination as regards acquirement of property through certain modes.⁽¹⁾

The modes of acquisition mentioned just above were in no case intended to be exhaustive and their number changed according to the necessities of the period and probably of the locality. Thus Manu mentions seven modes of acquisition⁽²⁾ whereas Nārada mentions only six.⁽³⁾ Some of the later commentators who considered property to be a secular acquisition went on adding to the already existing modes of acquisition⁽⁴⁾ till we find that authors like Pratāpa Rudra and Nīlakaṇṭha openly proclaim that modes of acquisition have for their sanction the authority not of the Śāstra but of public usage. It also appears that the Vaiśyas and Śūdras early lost their monopoly of acquiring property by trade, service etc. as even the other classes were allowed to acquire wealth by these means originally in cases of calamity or distress and subsequently even where this justification could not be alleged.⁽⁵⁾

(1) See infra.

(2) Manu X.115.

(3) Nārada referred to in Smr.Cha.160.

(4) In Mit.on Yaj.II.58 'ādhi' or mortgage is mentioned as a mode of acquiring conditional ownership. See also the discussion about 'kutta' in Sa.Vi.163-65. On p.165 Pratāpa Rudra remarks: 'svatvasyāpi laukikatvāt cha. Yatha loke dṛiṣṭam tathā svīkar-tavyam.' See also Vya.Ma.92 referred to infra p.249. For 'Kuttā' see Dr.J.D.M.Derrett: Kutta: A Class of Land-tenures in South India, B.S.O.A.S.(1958)p.62.

(5) See Medh.on Manu X.116.

The word 'sva' means 'one's own' and therefore the word 'svatva' denotes 'the state of being one's own'. Svatva thus denotes the possessive relationship which exists between the subject and the object of property. The commentators usually utilise the word 'svatva' to denote ownership. The words 'svāmya' and 'svāmitva' are also sometimes used as synonyms for 'svatva' though at times the commentators use the former in contradistinction from 'svatva' and to denote the right to control. The confusing use of these words by the commentators will be shown below.⁽¹⁾ However, 'svatva' is essentially different from 'svātantrya' which denotes right of free disposal according to all the commentators. Thus a person may have 'svatva' in a particular thing but he may not possess 'svātantrya' in regard to it.⁽²⁾ We find this distinction often resorted to by the commentators to describe the position of a woman, which appears in some cases to be analogous to the position of a minor.⁽³⁾ The principle that the right of free disposal is not an essential incident of ownership at all had an important part to play in the development of the concept of woman's property in general and of strīdhana in particular.

It is evident that the development of woman's property must have been directed by several changes in the structure of society and

(1) Medhātithi appears to have used the words 'svatva', 'svāmya' and 'svāmitra' as synonyms and in condistinction from the word 'svātantrya' - Medh.on Manu VIII.416. But Mitra Miśra treats 'svāmya' and 'svātantrya' as synonymous and as different from 'svatva' - see Vi.Mi.542 and 544. For the use of these words see infra pp.

(2) See infra.

(3) ~~Infra~~ pp.222, 228; see also p.179 note 4.

it is most likely that the development of the institution of marriage was a major factor which influenced the former. Hence a succinct survey of the development of the institution of marriage is an essential preliminary to the understanding and appreciation of the changes which ^{it} may have introduced in the proprietary capacity of females.

To appraise this development in its respective stages the śāstric literature itself may be divided into different periods bearing it in mind that the division is by no means rigid and does not represent water-tight compartments. The first stage is the Vedic Age during which the Ṛigveda was followed by the other three Vedas and then by the literature known as the Brāhmaṇas, Āraṇyakas, and the Upaniṣads. The Vedic period was followed by the Sūtra period in which the authors of the sūtras tried to establish the systems which ^{they} intended to propound by giving a series of mnemonical catch-phrases. The sūtra system covered all the branches of knowledge and the compilations of the sūtras which dealt with positive law were called the Dharma-sūtras. The sūtra period was, it is generally supposed, followed by the Epic period during which the two great epics known as the Rāmāyaṇa and the Mahābhārata were written. The Arthaśāstra of Kauṭilya and the Manusmṛiti may be included in this period. The Epic period was followed by the Smṛiti period which was succeeded by the period of the commentaries though it is not unlikely that some of the oldest commentaries preceded some of the later smṛitis. ⁽¹⁾

Coming to the institution of marriage one finds that although the Mahābhārata mentions that institution of marriage as

(1) The division made here is for convenience and not necessarily for chronology. For specialities of sūtra literature see Max Müller: A History of Sanskrit Literature p. 71 and onwards.

having been introduced by a sage named Śvetakatu⁽¹⁾ there was not a single stage in the development of the śāstric literature which was characterised by non-existence of the institution of marriage. Even during the period of the R̥gveda it was an already established institution.⁽²⁾ However, during its further development the age of the bride, the form of marriage, the dowry system, the customs of divorce, remarriage, polygamy, niyoga etc. must have influenced both the social position and proprietary capacity of women though, it must be noted, that the progress of the two was not necessarily even.

The age of the bride seems to have undergone a remarkable change. During the age of the R̥gveda the bride was necessarily grown up and after marriage she used to take the reins of the new house.⁽³⁾ Even during the later Vedas and Brāhmaṇas the normal age of the bride appears to have been not lower than that of puberty.⁽⁴⁾ During the Sūtra period it was being gradually reduced till pre-puberty marriage became an established custom in the Smṛiti period and continued to exist till the introduction of the British regime in India.⁽⁵⁾

(1) Ma.Bha.1.122.8-21.

(2) Ghate: Lectures on R̥gveda pp.155-56. A later vedic text says a person who has no wife cannot perform sacrifice - 'Ayajño vā eṣaḥ. Yo 'patnīkaḥ'. - Tai.Brāhmaṇa 2.2.2.6, 3.3.3.1.

(3) See Rig.Sam.10.85.46 also reproduced in Atha.Sam.14.1.44, Sa. Brāhmaṇa 1.2.20, Apa.Gri.Su.2.5.22 etc. See also Rig.Sam. 1.115.2, 1.117-18 etc. referred to for the purpose of this inference in The Vedic Age p.389 (a publication of the Bhāratīya Itihāsa Samiti). See also Dr.P.V.Kane: History of Dharmaśāstra Vol.II.439-40; Dr.A.S.Altekar: The Position of Women in Hindu Civilisation (1956)p.49; Prof.Indra: The Status of Women in Ancient India (1955)pp.41-43; T.S.Rajagopal: Indian Women in the New Age (1936)pp.9 & 52.

(4) The Vedic Age p.452.

(5) Kane Vol.II 430-46; Altekar 53-62; Indra 44-52; Rajagopal 52-54.

During the Vedic period the form of marriage appears to have been very simple⁽¹⁾ and it is unlikely that the eight forms of marriage so well-known to Smṛiti literature⁽²⁾ existed during the Vedic period. The form known as the Āsura which mainly consists of a purchase of a girl by paying a bride-price to the bride's parents was perhaps adopted by the Śāstra from the non-Aryan people.⁽³⁾ The Rākṣasa and the Paisācha forms which mainly consisted of a forcible abduction of a girl were probably recognised by the Śāstra by way of sanction for the customs of the indigenous aborigines.⁽⁴⁾ The Gāndharva form which was a kind of love-marriage was probably a result of the śāstric provisions about svayamvara.⁽⁵⁾ By the time of the sūtras the eight forms of marriage were well-known and the Brāhma, Daiva, Ārṣa and Prājāpatya were termed as approved forms whereas the Gāndharva, Āsura, Rākṣasa and Paisācha were termed as unapproved forms.⁽⁶⁾ The Śāstra determined, however, that a girl married in an approved form should be treated as a sapinda of her husband whereas

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- (1) Rig.Sam.10.85 known as the marriage hymn may be taken as representative of the ceremony of the marriage as it existed then.
- (2) See, for instance, Yaj.I.58-61.
- (3) The Āsura form is still practised by the aborigines and backward classes of Hindus - See Dr.D.N.Majumdar: Races and Cultures of India p.143.
- (4) Altekar pp.36-37. These forms were recognised by the Śāstra perhaps to give some status to the unfortunate girl - Vedic Age p.511. It is quite possible that these two forms were introduced and recognised after the Āsura form, for in the case of some of the indigenous tribes, it is seen that a bridegroom performs marriage by capture in case he is unable to pay the requisite bride-price - Races and Cultures of India p.154. But their independent origins may be suspected though not now capable of accurate demonstration.
- (5) For svayamvara see infra pp.240-41.
- (6) See Mayne pp. 84 - 88 ; Gupte pp. 913-18, also infra chapter IV

one married in unapproved form should be treated as a sapinda of her father. The reason probably was that ^{originally} the Śāstra treated an unapproved marriage as hardly equal to real marriage. (1)

Coming to the provisions about divorce and remarriage it must be noted that the Dharmasāstra does not contain specific provisions about divorce. But according to Nārada and Devala a woman can justifiably desert her husband in certain circumstances. (2)

Kauṭilya, however, gives rules for divorce and even allows divorce by mutual consent. (3) As regards remarriage the Atharvaveda appears to have approved remarriage of a widow and to have laid down rituals for it. (4) It is also recognised in some of the smṛitis (5) though in some others a woman is enjoined to have only one husband in her life-time. (6) The prejudice against widow-remarriage grew deeper during and after the Smṛiti period and by 1,000 A.D. remarriage was included in the notorious list consisting of things which are originally recognised by the Śāstra but which are banned during the Kaliyuga

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- (1) Baudhāyana, for instance, goes to the extent of declaring that a purchased bride does not become a wife but a slave - Bau. 1.11.21.4-5; see also Altekar pp.40-41. Against custom of bride-price see Manu IX.98
- (2) Na.Smr.15.97 and Na.Sam.13.100; Devala cited in Vi.Ra.447.
- (3) Kau.III.3, Shama Shastri's Ed.p.155. But he allows divorce only in case of unapproved marriages. For divorce in the Dharmasāstra see Kane Vol.I.96, Vol.II.519-22; Altekar pp.83-86.
- (4) Atha.Sam.9.5.27-28.
- (5) See Na.Smr.15.97 and Na.Sam.13.100; Pa.Smr.4.26; Kātyāyana cited in Apa.on Yaj.I.65 etc. wherein remarriage is allowed under certain circumstances.
- (6) See, for instance, Manu V.158-160, IX.47, IX.71 etc. See also Ma.Bha.1.104.34. For provisions concerning remarriage see Kane Vol.II.508-19; Altekar pp.150-55; Rajagopal 65-69.

on the authority of the public opinion.⁽¹⁾ Divorce and remarriage continued to exist, however, amongst the Śūdras and the aborigines of India.⁽²⁾

The practice of polygamy made its own contribution to the development of woman's property. During the period of the Ṛigveda monogamy appears to have been a general rule though there are a few references to polygyny here and there.⁽³⁾ By the time of the Brāhmaṇa literature polygyny appears to have become well-established, for this literature tends to advocate polygyny by giving sacerdotal reasons.⁽⁴⁾ The Kṣatriya class probably adopted this practice from the pre-Aryan and pre-Dravidian tribes whom the Aryans must have met after they commenced large-scale settling in India.⁽⁵⁾ However, the authors of the sūtras and smṛitis try their best to prohibit a person from superseding his wife capriciously or unjustifiably.⁽⁶⁾ Generally they allow supersession if the first wife is barren or is having only female children. However, it is possible that in practice a wife could be superseded on flimsy grounds.⁽⁷⁾

Polyandry is another notable feature of the institution of marriage. It did not exist during the Vedic age and the later Vedic

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- (1) Commenting on Na.Smr.1.40 Asahāya refers to the rule of re-marriage laid down in Na.Smr.15.97 and remarks: '...ityādikaṃ dharmaśāstroktamapi lokāchāravyavahāre parityaktaṃ'. For the list of 'Kalivarjyas' (things not to be practised in the Kali age) see the Smṛitikaustubha Nir.Ed.pp.470-79; Nir.Sindhu pp. 1287-89; see also Kane Vol.III.chapter XXXIV, Smr.Cha.620-21.
- (2) Altekar p.156; Rajagopal p.76. See also *infra* pp.457-59, 624
- (3) The Vedic Age p.390; Ghate p.166; Mayne p.172.
- (4) Tai.Sam.6.6.4.3; Sha.Bra.9.1.4.6.
- (5) Polygyny was common amongst the Nāgas and most of the pre-Dravidian tribes, and amongst the 'lower cultures' of India it is still common - Races and Cultures of India p.155.
- (6) Kau.III.2; Manu IX 80-81; Yaj.I.73.
- (7) For instance, see 'sadyastvapriyavādinī' - Manu IX.81.

literature gives sacerdotal reasons for permitting polygyny and prohibiting polyandry.⁽¹⁾ Polyandry is reported to have been existing from Kashmir to Assam amongst the Mongoloid people. In the south the tribes of Todas, Kotas and Tiyaṅs practiced polyandry. In Ceylon it appears to have been discouraged during the last century. It was also deep-rooted amongst the Nayars of Malabar.⁽²⁾ The Mahābhārata furnishes a spectacular instance of polyandry: the Pāṇḍavas, the five famous heroes of the epic, marry the same daughter of King Drupada. But from the depiction of the reaction of their mother Kuntī as well as of King Drupada it seems that it was a unique instance. It is quite likely that the Pāṇḍavas belonged to the non-Aryan stock who practised polyandry. From the later Śāstric literature it appears that the Aryans not only did not imitate this system but tried to curb it.⁽³⁾

Another custom which ought to be considered here is 'niyoga' (sometimes erroneously translated 'levirate') according to which a childless widow was allowed to bear children to her younger brother-in-law or to some other sapinḍa of the deceased husband. The practice appears to have been common during the Vedic period though it was being restricted in the Sūtra period. There was a greater reaction against niyoga in the Smṛiti period and ultimately the commentators

(1) Supra.

(2) Races and Cultures of India p.155.

(3) See Kane Vol.II.554-56; Altekar pp.112-114; Indra pp.64-67; M.W.Pinkham: Women in Sacred Scriptures of Hinduism (1941) p.155. See also infra p.635.

almost unanimously agreed that niyoga is one of the things forbidden during the Kaliyuga. ⁽¹⁾

According to the Śāstra marriage is a dāna or gift of the bride by her father and each religious gift is usually to be accompanied with gift in gold. It is no wonder, therefore, that in the Vedic and Epic literature we find many brides bringing rich presents to their husbands from their parents' houses. ⁽²⁾ From ancient times the daughter used to bring some property from her father's house to her husband's home although it appears that she had no absolute right so to do, but was allowed what her parents' and brothers' affection afforded her. ⁽³⁾ It is quite likely that these presents were intended for the bride herself or for both the bride and the bridegroom. These presents are to be distinguished from varaśulka or dowry, which denotes an amount to be paid by the bride's party to the bridegroom or his party and which serves as a condition precedent to the marriage. ⁽⁴⁾ The dowry system must have started only in the medieval period probably through shortage of eligible bridegrooms in certain castes and it is quite rampant throughout India even today. If it had been prevalent during the Sūtra or the Smṛiti period there is little doubt that their authors would have condemned the practice with the same vehemence with which they condemn purchase of a bride in Āsura marriage. ⁽⁵⁾

(1) For Niyoga see Kane Vol.III.599-607; Altekar pp.142-149; Indra pp.106-112.

(2) Altekar pp.70-72.

(3) See Durgāchārya's commentary on the etymology of the word 'duhitā' in Nirukta III.4.

(4) For varaśulka see infra.

(5) See supra.

Before turning to the development of woman's property we must not fail to notice the concept of the joint ownership of husband and wife, which is prominent in the Śāstric literature throughout. In the age of the Ṛigveda it was common for a newly married wife to become the mistress of her husband's house.⁽¹⁾ She must have shared this controlling authority in common with her husband. With the growing importance of land as valuable property the wife's authority must have naturally dwindled into insignificance because, unlike any male member of the family, she was not much useful in the cultivation of land. Probably as a compensation for her loss of individual rank in the house her pecuniary interest was identified with that of her husband.

The word 'dampatī' (i.e. a couple) which etymologically means 'the two masters of the house' suggests the idea of joint ownership of husband and wife. Thus Āpastamba declares that the two spouses are the owners of the wealth and that the other members of the family should act with their consent and for their benefit.⁽²⁾ He also declares that there can be no partition between husband and wife as from the time of their marriage there is a continuous partnership between them as regards performance of religious duties, the attainment of the results of such performance and the acquirement of wealth.⁽³⁾ Commenting on these sūtras Haradatta says that the partnership in the acquirement of wealth is manifested by the fact

(1) The Vedic age p.388; Ghate: Lectures on Rigveda p.166. See also supra p. 39 note 3.

(2) "Kutumbināu dhanasyaiśāte. Tayoranumate'nyepi taddhiteṣu varteran. - Apa.2.29.3-4. See also Tai. Sam. 'Ardho vā eṣa ātmano yatpatnī'.

(3) Apa.2.14.16-20 and the comments of Vijñāneśvara on these sūtras in Mit. on Yaj. II.52.

that the husband earns for the house whereas the wife spends it for the house.⁽¹⁾ However, the only difference between the positions of the husband and the wife is that the husband is an independent owner whereas the wife is a subservient owner. Therefore Haradatta and Bālabhaṭṭa hold husband's position in his house to be comparable to that of a King in his nation.⁽²⁾

That this concept of the joint ownership of husband and wife is not merely theoretical could be seen from several provisions of the Śāstra which purport to put this idea into practice: Āpastamba declares that one should distribute his property amongst one's sons during his life-time.⁽³⁾ Commenting on this sūtra Haradatta explains that Āpastamba does not mention the wife's share separately as he considers the husband's share to be his wife's share.⁽⁴⁾ Just as a husband can take possession of his wife's property in case of a calamity like famine, restraint etc.,⁽⁵⁾ the wife also can contract a debt for the sake of the family in case of calamity and can throw on her husband the burden of discharging that debt.⁽⁶⁾ Just as a son obtains a right by birth in the property of his father even though it was acquired before his birth the wife gets a right, since her marriage, in the property of her husband which he might have acquired even before the marriage.⁽⁷⁾

(1) "Dravyaparigraheṣu dravyārjaneṣu tathā sahatvameva. Tatra patirārjayati jāyā grihe nirvahati ..."

(2) Infra p. 228.

(3) Apa.2.14.1.

(4) "Bhāryāpyamśo na darśitaḥ. Ātmana evāṃśaḥ tasyā apīti manyate."

(5) Infra pp. 229-32.

(6) Na.Smr.4.12 & Na.Sam.2.10; Bṛhaspati cited in Vi.Mi.272 etc.; Kātyāyana cited in Apa.on Yaj.II.45-46.

(7) See Bālabhaṭṭa on Yaj.II.52 (Gharpure's edi.p.70).

The fact that husband and wife are united by marriage has been admitted by all the later commentators and some of them quote the famous text about the common property of husband and wife (dampatyormadhyagam dhanam) to show the reason why the early Hindu lawyers do not mention partition between husband and wife.⁽¹⁾ Aparārka says that the provision of Yājñavalkya which bars any litigation between husband and wife applies to the common property between them.⁽²⁾ By resorting to this very idea of common property of husband and wife Vijñāneśvara substantiates Yājñavalkya's provision which does not allow relations like debtor-creditor, surety-ship etc. to exist between husband and wife.⁽³⁾ Devaṇṇa says that Manu's provision prohibiting women from spending without their husbands' consent applies also to the common property of husband and wife.⁽⁴⁾

From the legendary and the inscriptional literature it appears that this idea of common property of husband and wife was brought into execution by several royal families. The King was often jointly crowned with his wife. In the Sātavāhana dynasty the jointly coronated couple used to rule jointly by issuing joint edicts. From the inscription found in the Madhya Bhārata it appears that in the medieval age a queen who shared sovereignty with her husband could

(1) For the text and the various reference to it see Dr.J.D.M. Derrett's An Indian Contribution to the Study of Property B.S.O.A.S.1956 p.475 at p.490. Raghunandana explains 'madhyagam' as 'ubhayasvāmikam' - Da.Ta.19.

(2) "Tathā cha dampatyoh sādharanadhanatvāt madhyake dhane vivāde" Addition to p.47 note 2 : Viśvarūpa commenting on Yaj.II.51 says : "Dampatyoravibhaktadhanatve..."; but this does not appear to be a reference to the above metrical composition but a mere paraphrase of the position enunciated in Apa.Su.2.14.16-20 supra p.45 note 3.

11.52 in Mit.).

(3) Mit.on Yaj.II.52, "Sādharanadhanatvāt."

(4) Infra p. 223.

bestow royal grants upon any person without taking the consent of her ruling husband.⁽¹⁾ It is not unlikely, therefore, that the members of the aristocracy followed the principle approved by the royal families. It must also be remembered that community^{of property} between husband and wife is recognised to some extent amongst the Tamils of Jaffna (Ceylon) and the peoples of the former Indo-China.⁽²⁾ The concept has reached full perfection in the Burmese customary law wherein it is given full effect to as regards both acquisition of property and succession to it.⁽³⁾

Even with this varied background in mind when one comes to examine the development of woman's property amongst Hindus one is surprised to find the vicissitudes through which a Hindu woman had to pass till she acquired full proprietary rights by the recent enactment of 1956. During the age of the R̥igveda the woman, according to almost all vedic scholars, had a respectable position in the house and the daughter-in-law usually used to take the reins of the new house.⁽⁴⁾ Even though the social position of women in those days appears to be fairly high references to their proprietary capacity are comparatively very scanty: in the R̥igveda they are rare in the case of the proprietary capacity of males as well. However, the later Samhitās declare the wife to be the mistress of the household property. Probably this was the time when land as an object of property was growing in importance and women who were usually incapable

(1) For a detailed discussion about the inscriptional literature on this point see D.R.Bhandarkar: Jethwai Plates of the Rashtrakuta Queen Silamahadevi; Saka-Samvat 706, Epigraphica Indica vol.22 p.98.

(2) B.S.O.A.S.1956 475 at 490 supra.

(3) Infra p.614.

(4) Supra p.39.

of regular cultivation of the soil failed to establish their claims upon land as well as moveables. However, women did own some property as can be seen from the fact that one of the Brāhmaṇas mentions that the famous sage Yājñavalkya gave all his wealth to one of his wives.⁽¹⁾ The wife is also declared to be the mistress of the household property.⁽²⁾

But it appears that women did not have any share in inheritance.⁽³⁾ The term 'dāya' was used to denote the father's wealth in those days though the term included all kinds of inheritance in the later days of the development of Hindu law.⁽⁴⁾ Therefore some of the Śūtri passages declare that women are not capable of taking 'dāya'.⁽⁵⁾ The Śatapatha Brāhmaṇa declares that wives are masters neither of themselves nor of 'dāya'.⁽⁶⁾ Yāska the author of the Nirukta quotes a non-extant verse of Manu to show the opinions of the two schools one of which maintained that daughters were incapable of inheriting property whereas the other school maintained the reverse.⁽⁷⁾ This

(1) The Śatapatha Brāhmaṇa 14.6.3.

(2) Tai.Sam.6.2.1.1: "Patnī pāriṇāhyasyeṣe." See also the Kāṭhaka Saṃhitā 24.8 and the Maitrāyaṇī Saṃhitā 3.7.9.

(3) For instance the daughter is not mentioned in Apa.2.14.1.

(4) The definition of the Nighaṇṭukāra is "Vibhaktavyaṃ pitṛidravyaṃ dāyamāhurmanīṣiṇaḥ." - quoted in Sa.Vi.344, Vi.Mi.411 etc. But the Saṅgrahakāra quoted in Sa.Vi.344, Vi.Ta.277 defines dāya as "Pitṛidvārāgataṃ dravyaṃ mātṛidvārāgataṃ cha yat." Thus the wealth of the mother seems to have been included in the word dāya later on. The famous text of Nārada which has been held by the commentators to be applicable to the property of both the father and the mother actually contains only the word 'pitṛya' - see Na.Smr.16.1 & Na.Sam.14.1 and the comments of Viṣṇāneśvara on it in Mit.on Yaj.II.114. For the concept of 'dāya' see infra p. 214.

(5) See Maitrāyaṇī Saṃhitā 4.6.4 : "Tasmāt pumāndāyādaḥ stryadāyādā..." See also Tai.Sam.6.5.8.2.

(6) Sha.Bra.4.4.2.13 : "...nātmanaśchaneṣate na dāyasya chaneṣate."

(7) The Nirukta III.4.

was probably a time when land was becoming the most valuable kind of the father's property and during the period of transition it is not improbable that two schools existed expressing divergent opinions about the capacity of daughters to inherit a share in all their father's property.

When the reader passes from the Vedic literature to the Sūtra literature and the early Smṛiti literature he finds that women have fallen spectacularly from their original position. The whole picture is entirely changed and the metamorphosis is so rapid that even a stage of transition cannot be traced. The Śāstra at this stage became very jealous of giving women either social freedom or proprietary rights. Thus Baudhāyana declares: "A woman does not gain independence."⁽¹⁾ He further declares, "The Śruti says that women, being devoid of any organs, are incapable of inheriting property."⁽²⁾ He also lays down that the proper state of woman is that of perpetual tutelage : she is to be protected by her father, husband, and son during her maidenhood, youth and old age respectively.⁽³⁾ Baudhāyana is supported in his theories by many other eminent authors such as Manu, who proclaims that a wife, son and a slave are incapable of owning any property and that the property which they earn belongs to the person to whom they themselves belong.⁽⁴⁾ The Mahābhārata and the Nāradaśmṛiti contain almost an identical text.⁽⁵⁾ Authors such

(1) Bau.2.2.3.45 : "Na strī svātantryaṃ vindate."

(2) Bau.2.2.3.47 : "Nirindriyā hyadāyaścha striyo matā iti śrutiḥ."

(3) Bau.2.2.3.46. For this perpetual dependence of women see also Manu IX.3; Yaj.I.85; Na.Smr.16.31 & Na.Sam.14.31.

(4) Manu VIII.416: "Bhāryā putrāścha dāsāścha traya evāddhanāḥ smṛitāḥ/ Yatte samadhigachchhanti yasya te tasya taddhanam//

(5) Ma.Bha.1.82.22 & 5.64; Na.Smr.8.41 & Na.Sam.6.39.

as Viṣṇu, Gautama, and Vasiṣṭha declare that a woman is incapable of having independence.⁽¹⁾ Ratifying Baudhāyana's theories about women's dependence and their incapacity to have a share in inheritance, Govindasvāmi, Baudhāyana's commentator, discloses an apprehension that if a woman is allowed to take a share in the 'dāya' she would become independent.⁽²⁾ Thus there is almost a remarkable concord amongst all these authors in denying women either social independence or a share in the family property and the two appear to be closely connected in the jurists' minds.

It is very difficult to trace the reasons why there was such a steep decline in the legal and social position of women from the Vedic period to the Sūtra period. With the scanty information that is at hand it is best to offer a few tentative conjectures. Firstly, it is quite likely that the gradual reduction in the age of the bride in the post-Rigveda days was mainly responsible for this decline. Marriage of a pre-puberty bride estranged her from her father's house where she could not have any effective voice; on the other hand, on account of her youth she could hardly be entrusted with a responsible position in her husband's family wherein the husband must naturally have taken a dominant position from the very beginning of his married life subject perhaps to the dominance of his own father. Probably the husband's initially dominant position continued throughout his married life. From a proprietary point of view it seems the women's position was intentionally lowered to avert the possibility of the young widows getting remarried and

(1) Vis.Smr.25.12; Gau.18.1; Vasiṣṭha 5.1.

(2) "Dāyalabdhe tu tasyāḥ svātantryaṃ bhavet kṛitakṛityatābhimānenetyabhiprāyaḥ." - Govindasvāmi on Bau.2.2.3.45.

carrying away family property along with them. The second probable reason is the adoption of the Āsura marriage by Aryans following the practice of the indigenous people. In the Āsura form of marriage the girl was virtually sold to the bridegroom and this must have tended to reduce her position, at least in the beginning, to that of a chattel. The idea that women, as they could be bought with money, were tantamount to chattel became so popular that Jaimini, the author of the Pūrvamīmāṃsā-sūtras, had to discuss the same as a special topic in order to refute the idea and to propound that women are capable of owning property in their own right.⁽¹⁾ Yājñavalkya had specifically to exclude the wife and son from things capable of being given.⁽²⁾ But the usage of the Āsura marriage had lowered women's position so considerably that the idea that the husband owns his wife lingered long after the Sūtra and the Smṛiti periods.⁽³⁾ Thirdly, it is likely that the Aryans during this period came into deeper contact with the indigenous tribes some of which were matriarchial and polyandrous. As a violent reaction to the strange customs of the indigenous people, which must have stunned the Aryans the latter probably decided to recoil in their primitive stage and to confine their women within the four walls of the house. Fourthly, the continuous invasions of the tribes of the Śakas, Hūṇas etc. were disturbing the stability of the society which was being plundered in every sweep of

(1) See Jai.Su.6.1.6-21 fully discussed in Dwarka Nath Mitter: Position of Women in Hindu Law pp.56-133. For the Pūrvapakṣin's argument to the effect that women, being sold and bought in marriage, are nothing more than a chattel see Jai.Su. 6.1.10-12. For references to women being treated as chattel in Ancient India see J.J.Meyer: Sexual Life in Ancient India pp.507-533.

(2) See infra p.25).

(3) See infra pp.251-55.

invasion.⁽¹⁾ As a defensive policy the Aryans probably thought of cordoning off their women who were more in the danger of being abducted or defiled. Fifthly, it has already been conjectured that the increasing value of land must have decreased the position of women who had to wait for a long time till the agrarian economy of the Aryans was also supported by other industries.⁽²⁾ It is quite likely that any one or more of these reasons were responsible for the downfall of women during the age of the sūtras, epics and the early smritis.

But it is in the sūtra period itself that the germ of strīdhana was developing. In the earlier days land was probably not partitioned and it used to pass undivided to the eldest son. The other sons used to receive cows, implements of cultivation, the family house, cattle etc. in certain shares.⁽³⁾ But from the earliest times even women always had some property which they gained as a nuptial gift either from their father's house or husband's house.⁽⁴⁾ In the early days, therefore, that was the only property which, in addition to their household property,⁽⁵⁾ belonged to them and devolved upon their heirs. Thus Āpastamba declares ornaments and household things to be the property of the wife.⁽⁶⁾ At the time of the parti-

(1) See Altekar p.350 wherein he quotes the Yugapurāṇa which describes the Śakas as destroying one-fourth of the population by weapons and abducting one-fourth of the population of the invaded territory to their own territory.

(2) From the various references given by the commentators it seems that spinning and weaving later on formed the special vocations of women.

(3) See rules of shares in partition laid down in Vas.Smr.17.40-46.

(4) See supra p.44 note 3.

(5) Supra p.43 note 2.

(6) Apa.2.14.9, appendix text no.4./ See also Āpastamba quoted in Mit.on Yaj.II.115: "Paribhāṇḍaṃ cha grīhe 'lāṅkāro bhāryāyāḥ."

tion of the father's property i.e. 'dāya' the property of the mother was divided amongst the daughters. Thus Vasiṣṭha declares, "Women should partition their mother's nuptial wealth."⁽¹⁾ Saṅkha says: "When 'dāya' is being partitioned the daughter should get ornaments and the nuptial strīdhana."⁽²⁾ Gautama lays down special matrilineal succession to strīdhana.⁽³⁾ Thus whereas the father's property devolved upon his issue in the male line the mother's property devolved upon her issue in the female line.

When one comes from sūtra period to the Smṛiti period one comes into an atmosphere of greater certainty. The concepts of coparcenary property, self-acquired property of males and of women's separate property seem to have grown more precise during this period. With the increasing compactness of the coparcenary property the probability of women and widows being neglected by the family was visualised by society and consequently by the Hindu jurists. It was necessary to protect their future by giving them some kind of property to be at their absolute disposal with a view to ensure their maintenance in case of misfortune such as widowhood, desertion by their husbands etc. The whole concept of strīdhana seems to have been based upon this urge to provide women with some reserve fund for their maintenance. Kauṭilya and Kātyāyana declare in specific terms this particular purpose of strīdhana.⁽⁴⁾

It was the spirit of Hindu law that things which constituted

(1) Vas.Smr.17.43, appendix text no.8.

(2) Saṅkha quoted in Sa.Vi.362 etc., appendix text no.15.

(3) Gau.Su.28.22 ~~infra p. 309~~, appendix text no.1

(4) Kau.III.2: "Vṛitiirābandhyaṃ vā strīdhanam", and "Āpadartham hi strīdhanam", appendix text no.19. Kātyāyana cited in Vi.Ta.443 etc., infra p. 71, appendix text no.58.

the means of maintenance of a particular person should not be taken away from him.⁽¹⁾ It was therefore necessary to protect strīdhana which formed the reserve fund for maintenance of women. In this connection the protection given to the earliest category of strīdhana, namely, nuptial gift must be considered first. We have seen that the bride's father gave such gifts jointly to the bride and the bridegroom.⁽²⁾ Probably it was handed over to the bridegroom and it was quite likely that it could have become mixed with the joint family property of the bridegroom's family so as to be permanently lost to the bride herself. Therefore like the gains of learning and property obtained by valour it was included into the list of impartible property of males. Thus Nārada declares 'wife's property' to be impartible.⁽³⁾ The category 'wife's property' is explained by Harinātha as 'saudāyika'⁽⁴⁾ and by Bhavasvāmi as 'strīdhana'⁽⁵⁾ - terms on which further light will be thrown later on. It will also be shown later on how women's property was meticulously protected by totally forbidding the relatives from usurping it under any pretext.⁽⁶⁾

Another protection was given to women's property by excluding it from properties capable of being claimed by others by adverse possession.⁽⁷⁾

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- (1) See Na.Sam.18.11-12 which describes the means of livelihood of different kinds of people and forbids the King from confiscating them under any circumstances, see also Bhavasvāmi's comments on the verses.
- (2) Supra p.44.
- (3) Na.Smr.16.6 & Na.Sam.14.6: "Śauryabhāryādhane chobhe yachcha vidyāadhanam bhavet/ Trīṇyetānyavibhājyāni prasādo yaścha paitṛikaḥ/" See also 'audvāhika' occurring in Manu IX.206 and Yaj.II.119. Kātyāyana cited in Vi.Ta.344 says that conquered property, gains of learning and strīdhana are not to be partitioned by heirs.
- (4) Smr.Sa.f.60.
- (5) Bhavasvāmi on Na.Sam.14.6
- (6) See infra chapter III.
- (7) Na.Smr.1.82-83 & Na.Sam.1.74, Manu VIII.149 and Medhātithi's comments on it; Mit.on Yaj.II.125.

Vijñāneśvara propounds the ignorance and lack of understanding of women as the reasons why the Śāstra forbids anybody to claim the property of women by adverse possession.⁽¹⁾ It is curious that it is also excluded from the operation of escheat.⁽²⁾ This was probably done with a view to deny the King a right which he could have used capriciously, maliciously or injudiciously against ignorant women.

Contemporaneously with the instances of protection given to women's property the bulk of the same was also increasing. In the earlier period the bride used to have as her own property her ornaments and some nuptial gifts. After the Āsura form was denounced by the Śāstra the father probably started giving the bride-price to the bride herself thus exonerating himself from the blemish of "sale". This was known as śulka and it may be considered to be one of the earliest varieties of strīdhana as an early author like Gautama mentions a special and quite a rational order of succession to it.⁽³⁾ With the increase of polygamy in the later days it became necessary to provide the first wife with some money whether for her maintenance in case she could not live happily with her co-wife, or in order to obtain her consent by way of appeasement by gifts in case the supersession was not in accordance with the rules of the Śāstra. This kind of property was called ādhivedanika.⁽⁴⁾ In this manner the categories of strīdhana were continuously increasing during the Smṛiti period.

(1) Mit.on Yaj.II.125, see infra p.206 . For adverse possession see infra pp.179-189

(2) Infra p.461 . See also Kau.3.5 for restrictions on the King's right to take by escheat.

(3) Infra p.310.

(4) Infra pp.72-74.

It is also necessary to consider the development of women's right to inherit property. We have already seen that the later part of the Śruti and some authors like Baudhāyana totally denied this right to women. But with the general reduction in the average^{age} of the bride and the decrease in the custom of remarriage it was probably felt necessary to ensure the future of child-widows. Gautama, therefore, gave the right of inheritance to the widow if she was willing to have a son by 'niyoga'.⁽¹⁾ Vasiṣṭha granted this right to wives of brothers only after they had given birth to a child.⁽²⁾ But after the custom of 'niyoga' was declared to be 'kalivarjya',⁽³⁾ the widow, along with some other female heirs, gained this right without the condition precedent of 'niyoga'. Thus Āpastamba recognised the daughter as an heir.⁽⁴⁾ Viṣṇu recognised the wife, the mother and daughter as heirs.⁽⁵⁾ Manu mentioned daughter, mother and father's mother amongst the heirs of a male.⁽⁶⁾ Nārada allowed this right at least to the daughter.⁽⁷⁾ But since the smṛiti of Yājñavalkya these female heirs came into prominence and gained an accepted place in the order of succession known to the modern Hindu law as the 'compact series of heirs'.⁽⁸⁾ He gave special importance to the widow by giving her a place immediately after the son, son's son, and son's son's son. Bṛihaspati resorted to the Vedic idea that wife is the half of the husband's body and gave the right of inheritance to the

(1) Gau.28.22-23: "Strī chānapatyasya, bījam vā lipsyeta."

(2) Vas.Smr.17.39.

(3) Supra p. 42.

(4) Apa.2.14.4 and Haradatta's comments on it.

(5) Vis.Smr.17.4,5,7. Saṅkha, however, refers to the right only of the eldest widow - Saṅkha quoted in Vis.on Yaj.II.140.

(6) Manu IX.130, 217.

(7) Na.Smr.16.50 & Na.Sam.14.47.

(8) Yaj.II.135-36.

widow on the principle of survivorship.⁽¹⁾ He gave the same right to the daughter by stating that even the daughter is, like the son, produced from one's own body.⁽²⁾ He also recognised the right of the mother.⁽³⁾ Thus the three important relations of a male were recognised during the Smṛiti period as his heirs.

The commentators when they wrote their commentaries had all this development in mind but instead of recognising the different vicissitudes in the proprietary capacity of women they resorted to the two famous Mīmāṃsā principles of treating each provision of śruti and smṛiti to be purposeful and of reconciling wherever possible the contradictory provisions of the Śāstra.⁽⁴⁾ But in doing this each of them had an ultimate purpose in mind, namely, to propound a system of law peculiar to his own time and place. All commentators admit that women can own almost any category of property which men can own but in doing so they have to explain the texts declaring women's total incapacity to own property⁽⁵⁾ by stating that these texts do not declare women's total incapacity to own but stress the perpetual dependence of women.⁽⁶⁾ This was exactly the crux of the general

(1) Bṛihaspati quoted in Apa.on Yaj.II.135: "Āmnāye smṛititanetre cha lokāchāre cha sūribhiḥ/ Śarīrārdham smṛitā bhāryā puṇyāpuṇyaphale samā// Yasya noparatā bhāryā dehārdham tasya jīvati/ Jīvatyardhaśarīre'rtham kathamanyaḥ samāpnuyāt// For the Vedic stand see supra p.45 note 2.

(2) Bṛihaspati cited in Mit.on Yaj.LL.135: "... Angādaṅgātsambhavati putravadduhitā nṛīnām// " Nārada recognises the daughter's right on the principle of survivorship: "Yathivātmā tathā putraḥ putrena duhitā samā/ Tasyātmani tiṣṭhantyaṁ kathamanyo dhanam haret// " - Nārada cited in Apa.on Yaj.II.136.

(3) Bṛihaspati cited in Apa.on Yaj.II.135.

(4) These are 'sārthyakatā' and 'sāmañjasya' for which see supra pp. 9-10

(5) Supra p.50.

(6) See Medhātithi on Manu VIII.416, Vya.Ma.154. Aparārka, Varadarāja treat the Śruti forbidding women from partaking 'dāya' as merely an arthavāda - Apa.on Yaj.II.135, Vya.Ni.459. Some authors apply these texts to property given by strangers and acquired by women by skill or labour - *infra* p.208.

attitude of the commentators; for, as we shall see, increased proprietary rights of women with a continuation of the previous state of their dependance may be considered as a special feature of this later legal literature of the Hindus.

Whereas the majority of women suffered from lack of independence it appears that Hindu law always recognised the freedom of women who could help their husbands in their trade, thus showing that the dependence of women was due only to their normally restricted economic value.⁽¹⁾ Thus Yājñavalkya, though he declares that the husband need not pay the debt contracted by his wife,⁽²⁾ provides that the debts contracted by the wives of herdsmen, ~~wine-merchants~~ etc. ought to be repaid by their husbands as in their profession such husbands depend upon their wives.⁽³⁾ Commentators such as Viśvarūpa, Vijñāneśvara etc. explain that the enumeration of herdsmen etc. is not exhaustive and that the provision refers to all persons who depend upon their wives for subsistence.⁽⁴⁾ Most of these women practised also clandestine prostitution.⁽⁵⁾ Unlike other respectable women⁽⁶⁾ they had also the right to institute judicial proceedings without the permission of their husbands.⁽⁷⁾ Thus it seems that women who had

(1) See infra chapter V for the special law applicable to these women.

(2) Yaj.II.46.

(3) Yaj.II.48: "Gopaśaundikaśailuṣarajakavādhayoṣitām/ Rīṇaṃ dady-ātpatistāsām yasmādvṛittistadāśrayā/". See also Na.Smr.4.19 & Na.Sam.2.16; Brihaspati cited Apa.on Yaj.II.46 etc.; Kātyāyana cited in Apa.on Yaj.II.51 all of whom lay down a similar provision.

(4) See Vis.on Yaj.II.50; Mit.on Yaj.II.48. Chanḍeśvara says: "Atra cha tadāśrayatitvameva prayojakaṃ na tu jātyādarah - Vi.Ra.59-60. See also Vyavahārapariśiṣṭa f.54(b) to the same effect.

(5) Infra pp.513-14.

(6) Kātyāyana cited in Apa.on Yaj.II.5.

(7) Kātyāyana cited in Apa.on Yaj.II.5 and the explanation by Aparārka.

some economic value and who were not a part of the usual agrarian economy of the country had full legal independence. The principle underlying this reasoning can properly be extended to the conditions of the modern society.

After having taken a brief survey of the development of women's property in general and before examining the difference if any between women's property in general and strīdhana or women's separate property it is necessary to remember the three prominent feature of strīdhana which we have already noticed:

(1) Firstly, the concept of strīdhana arose out of a necessity to create a reserve fund which could be useful to women in case they were unable to obtain maintenance from their families. The concept was assuming wider proportion during the time of the smritis and more and more categories of property were being included in it.

(2) Secondly, this fund was well protected from the covetous eyes of the relatives, strangers and the King by keeping it away from the clutches of partition, adverse possession and escheat respectively.

(3) Thirdly, right from its inception, strīdhana usually had a line of descent in which males were postponed to females.

"During the voluminous discussions, ancient and modern, which have arisen with regard to separate property of women under Hindu law, its qualities, its kinds, and its lines of descent, the question has constantly been found in the forefront, what is stridhan ?"⁽¹⁾ The concept of strīdhana being subject to constant change and development, a wide divergence of opinion as regards its exact meaning is seen amongst the authors, both of the smritis and of the commentaries.

Before going into the complicated discussions of the commentators it is perhaps better to look at the texts of the different smritis without the help of the interpretations which have been put forward by the former.⁽²⁾ The first and the most important text is that of Manu. He gives the import of the term strīdhana as follows:- "What is given before the nuptial fire, what is given during the bridal procession, what is given in token of love and what is obtained from a brother, mother or father is known as the six-fold strīdhana."⁽³⁾ In the very next verse he also adds 'gifts after the marriage' and 'gifts made by the husband out of love'.⁽⁴⁾

(1) Sheo Shankar v. Debi Sahai (1903) 30 I.A. 202 at 205.

(2) Incidentally, however, such reference will be made where it is absolutely necessary or where the commentators referred to do not belong particularly to either of the schools.

(3) Manu 9. 194. For the Sanskrit texts of this verse see the appendix text no. 25 wherein the main variant readings of the verses concerning strīdhana are given. The nuptial gift is called 'adhyagni' and the gift given during the bridal procession is called 'adhyāvāhanika'.

(4) Manu 9. 195. See the appendix text no. 26.

The second part of this verse lays down a rule of succession to strīdhana mentioned in both these verses.⁽¹⁾ That the texts do not give a perfect definition nor an exhaustive enumeration is clear from the fact that Manu, after having stated that strīdhana is of six kinds, himself adds two more varieties in the verse. The enumeration of these different categories does not make these categories mutually exclusive and a particular property may fall into one or more of these categories of strīdhana.⁽²⁾ From the fact that Manu forbids 'heirs' (dāyādas) from dividing the ornaments which women wear during the life-time of their husbands, it appears that he intended to include, by implication, such ornaments within strīdhana.⁽³⁾ It is strange that none of the commentators who have commented upon the Manusmṛiti itself declares that this six-foldness (ṣaḍvidhatva) is merely illustrative and not exhaustive. Nandana

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- (1) This is the opinion of Vijñāneśvara also. The provision is similar to Yaj.2.143-44. See infra. Some of the commentators, however, believe that the rule of succession is meant only for the two categories mentioned in this verse. See infra. Really speaking 'gift in token of live' mentioned in the preceding verse would include also gift from the husband mentioned in this verse - see Kullūka and Rāmachandra on Manu 9.194.
- (2) For instance 'pitṛiprāpta' may be 'adhyagni', 'adhyāvāhanika' or 'anvādheya'.
- (3) Manu 9.200 compared with Apa.2.14.9 and Bau.2.2.49 supra p. But see Nandana's comment on the verse. According to Sarvajñanārāyaṇa, Kullūka etc. they are not to be partitioned so long as the woman is alive. See also Vis.Smr.17.22 for a similar provision. But Nandapaṇḍita commenting on this verse says that partition is forbidden only during the life-time of the husband. Although grammatically both these interpretations are possible the first one is preferable and popular. For a religious sanction against the relatives who utilise woman's strīdhana see Manu 3.52. If any male makes a living upon strīdhana he commits a second-degree sin (unapātaka) - See infra p.530. For Manu 9.200 see appendix text no.31.

indeed openly declares that any property falling outside the scope of these six kinds is not strīdhana.⁽¹⁾

The enumeration given by the sage Kātyāyana is almost a replica of Manu's first verse.⁽²⁾ Nārada also gives the same kind of enumeration but he mentions 'bhartrīdāya' (lit. inheritance from the husband) and does not mention 'gift in token of love' which Manu has mentioned.⁽³⁾ He does not mention even the post-nuptial gifts (anvādheya) mentioned by Manu.

Viṣṇu enumerates strīdhana in this way : "That which is given (to a woman) by her father, mother, son or brother, that which is received before the nuptial fire, that which is received on supersession, that which is given by the relatives, dower and post-nuptial gifts constitute strīdhana."⁽⁴⁾ Thus Viṣṇu adds two important categories viz. gift on supersession (ādhivedanika) and dower,

- (1) Sarvajñanārāyaṇa, Kullūka, Rāghavānanda and Rāmachandra are silent on this point. Medhātithi's comment appears to be lost to us. But Nāndana specifically says "The meaning is: anything which is obtained by a woman besides these six categories of strīdhana, is not strīdhana but becomes only her husband's property". However, almost all the reputed commentators of the different schools specifically mention that the word sixfold is only illustrative and not exhaustive. - see infra p. 80. Although some of Manu's commentators are later than Viṣṇu and although some of them in fact generally support him it seems that the unanimously conservative attitude adopted by them in this respect is in conformity with the spirit of the Manusmṛiti itself which they chose to comment upon.
- (2) Kātyāyana referred to in Da.Bha.4.1.4. See the appendix text no.46.
- (3) Na.Smr.16.8 & Na.Sam.14.8 appendix text no.39. However, Bhava-svāmin commenting on the latter says that where sixfold strīdhana is referred to these categories are to be understood. Thus he treats the word 'six-fold' as being illustrative.
- (4) Vi Smr.17.18. See the appendix text no.9.

(śulka), to the enumeration given by Manu.⁽¹⁾ These additions reveal important changes in the social and legal ideas of the Hindu society. It seems that by this time men had started taking undue advantage of some of the provisions of the Śāstra which conferred on males arbitrary power to supersede the first wife even on flimsy grounds.⁽²⁾ Viṣṇu, therefore, probably thought of discouraging this capricious practice without actually curtailing the rights conferred upon the husband by the preceding Śāstrakāras and introduced a measure which would have a retributive and consequently a deterrent effect.⁽³⁾ The introduction of dower denotes that the Aryan society of Viṣṇu's time was inclined to be guided by Manu's censure against a father who received money for his daughter⁽⁴⁾ and instead of preventing this practice altogether, thought of converting the bride-price into strīdhana of the bride herself. Customs reflecting a change of attitude ^{towards} the ancient bride-price doubtlessly began to spread about this time as they have continued to spread in India and South-East Asia today. Viṣṇu also extends the term strīdhana to gifts received from any relative, whereas Manu mentions gifts only from the three relations. He also confirms

(1) For information about the rules concerning supersession and the custom of dower see supra pp.42 and 56 respectively.

(2) See supra p.42.

(3) For another reason see infra pp.72-3. What is said in the text above is not to be understood as propounding any view regarding the relationship of the actual author or authors of 'Viṣṇu' to public opinion at any particular time.

(4) Supra p.41.

Manu's pronouncement about the ornaments worn by women during their life-time.⁽¹⁾

Yājñavalkya says : "That which is given (to a woman) by her father, mother, husband or brother, that which is received before the nuptial fire, that which is received on supersession et cetera is well-known to be strīdhana."⁽²⁾ In the first line of the next verse he also adds gifts from relatives, dower, and post-nuptial gifts to his enumeration given in the preceding verse and in the second line gives a rule for the devolution of the property.⁽³⁾ There are two important versions of the first verse of Yājñavalkya. The above translation is in accordance with the reading of the Mitākṣarā and is comparatively the more popular.⁽⁴⁾ The other version reads 'eva' (only) in the place of 'ādyam' (et/cetera).⁽⁵⁾ The difference between these two versions is most important, as will be shown later, for the purpose of ascertaining the exact meaning of the term strīdhana. The first reading may include any kind of

(1) Vi.Smr.17.22.

(2) Yaj.2.143, appendix text no. 33

(3) Yaj.2.144. See the appendix text no. 34. The rule of succession appears to apply to the kinds of property described in both the verses. For a similar rule in the Manusmṛiti see supra.

(4) The same reading is followed in Smr.Cha.; Ma.Pa.; Pa.Ma.; Nri.Pra.; Vya.Ma.; Vi.Ta.; Sa.Vi.; Vi.Mi.etc.

(5) This or a reading similar to this has been followed by Viśvarūpa, Aparārka, Chandeśvara, Misaru Miśra and all the authors of the Bengal school. But Aparārka explains it in the Mitākṣarā way. See infra.

woman's property within strīdhana⁽¹⁾ whereas the latter expressly precludes any other category from being included into the import of the term. However, leaving aside the term 'etcetera', it is important to note that Yājñavalkya has, in his enumeration, confirmed all the additions which Viṣṇu has made in his own enumeration.⁽²⁾

Devala declares : "Money offered as a provision for maintenance, ornaments, dower and her gains form the property of a woman (strīdhana)."⁽³⁾ Thus Devala adds two categories viz. maintenance money and 'gains' to the list of strīdhana categories. It is to be noted that the word 'gains' (lābha) is capable of a wide interpretation including gain resulting from gifts from kindred or gains arising out of profits from any business wherein some strīdhana

(1) Here it must be noted that the word 'ādhivedanikā^dyaṃ' is to be distinguished from similar compound words such as 'brāhmādi', 'brāhmaṇādi', 'brahmahādi' etc. which stand as representatives of a particular well-defined enumeration of a group or class etc. Such compound words denote those groups or classes the enumeration of which usually begins with the first word in such compound words. Thus the word 'brāhmādi' denotes the eight forms of marriage the enumeration of which begins with the brāhma form or, by context, only the four approved forms of marriage; similarly the word 'brāhmaṇādi' denotes the four varṇas or classes of men and the word 'brahmahādi' denotes the five mahāpātakins (persons who have committed great sins). But the word 'ādhivedanikā^dyaṃ' is not to be confused with such words; for, instead of coming at the head of the enumeration it comes, in fact, at the end of it. Therefore it cannot represent anything like a gaṇa or jāti. The word 'ādya' which has thus been used very loosely welcomes any kind of woman's property.

(2) See supra pp. 63-64.

(3) Devala quoted in Apa. on Yaj. 2.147 etc. See the appendix text no. 78.

has already been invested.⁽¹⁾ The word is really wide enough to cover any kind of new acquisition of property.

Making a sum-total of these texts one finds that the following categories of property are expressly included by the authors of the smritis in the term *strīdhana*:-

- (1) That which is given before the nuptial fire;
- (2) That which is given during the continuance of the bridal procession;
- (3) That which is given by the mother, father, brother, husband or the son;
- (4) That which is given in token of love;
- (5) That which is given by the rest of the kindred;
- (6) That which is received on supersession;
- (7) That which is received as a grant for maintenance;
- (8) Dower; and
- (9) Other gains.

Ornaments which form as it were the nucleus of all *strīdhana*⁽²⁾ may

(1) According to Smr.Cha.657, Ma.Ra.378 and Vi.Mi.545 the word 'lābha' denotes gifts given by the elders on some ceremonious occasions. But according to Vya.Ma.157 and Sa.Vi.381 it denotes interest on the capital consisting of the previous *strīdhana*. According to the *Smritisāra* of Harinātha (f.63) it denotes the dower (*śulka*) of the woman. Most of the other commentaries do not contain any comment on the verse. The benefit of this 'lābha' in the second sense was probably secured first by the Vaiśya women whose husbands would never have liked the idea of keeping *strīdhana* in unproductive forms like ornaments etc. They probably started borrowing *strīdhana* from their wives and agreed to pay interest in return. Some modern Vaiśyas, namely, the Chettis in the South often indulge in this practice even today. See the facts of Palaniappa V. Nachiappa (1941) II M.L.J. 558.

(2) See supra p.53.

fall into one or more of the above categories though they have not been expressly included in the enumeration given by the *smṛitis*.⁽¹⁾

Kātyāyana who has enumerated only six categories of *strīdhana* given already by Manu, however, defines many other categories which he himself has not included in his six-fold enumeration. For the study of *strīdhana* Kātyāyana is of great importance for the fact that no other sage has tried to define as many kinds of *strīdhana* as he has.⁽²⁾ It must also be stated that he has devoted many more verses to this topic of *strīdhana* than have the other sages. But as his *smṛiti* is not available in its original form it is difficult for a reader to interpret and to co-relate his rules with certainty.

Kātyāyana defines nuptial gifts (*adhyagni*) as follows:-

"That which is given to women near the (nuptial) fire is denominated by the sages as *strīdhana* made over in the presence of the (nuptial) fire."⁽³⁾ He defines gifts on the bridal procession as "That which a woman receives while she is being led away from her parental abode is *strīdhana* as illustrated by the name *adhyāvāhanika*."⁽⁴⁾ Another version of the same verse reads 'from the

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- (1) But Nandana on Manu 9.200 says that as ornaments are not included in *strīdhana* the provision concerning them is introduced as exception to the rule that the heirs of the husband take his property on his death.
- (2) Moreover decisions denying that property inherited by a woman is her *strīdhana* rest almost entirely on the authority of Kātyāyana. See *infra*.
- (3) Kātyāyana cited in Mit.on Yaj.2.143 etc. See the appendix text no. 47.
- (4) Kātyāyana cited in Mit.on Yaj.2.143 etc. See the appendix text no. 48.

family of her parents' in the place of the words 'from her parental abode' but if one follows the natural construction of the sentence the meaning is not materially changed.⁽¹⁾ Some of the commentators, however, try to interpret this second version by connecting these words with the verb 'receives' instead of connecting them with the words 'being led away'.⁽²⁾ This method naturally restricts adhyāvāhanika to gifts received only from the parental family. Looking, however, to the plain meaning of the two definitions, namely, those of adhyagni and adhyāvāhanika it appears that both these kinds of property include gifts from strangers as well as from relatives.

Kātyāyana defines prītidatta or gifts in token of love thus : "That which is given through affection by a mother-in-law or a father-in-law and that which is given to a woman by persons at whose feet she is making obeisance, is called prītidatta (strīdhana)." ⁽³⁾ The second part of this definition denotes gifts given through affection on some formal occasion of showing respect to

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- (1) This first version has been accepted in the Mitākṣarā and the treatises known as authorities of the Benares, Bombay and Dravida schools. The second version is accepted in the Dāyabhāga and the authorities of the Bengal and Mithila schools. According to Vi.Chi.138 the adhyāvāhanika would include gifts given at the time even of the dvirāgamana ceremony, namely, at the time when a bride who has been married before puberty leaves her parents' home for the second time after the attainment of puberty. See infra p.485.
- (2) This has been done only by the authorities of the Bengal school - see Da.Bha.4.1.7 and the commentaries of Śrīnātha, Rāmabhadra and Maheśvara on the same. The last one includes, however, even the gifts from the house of the maternal grandfather of the bride.
- (3) Kat.quoted in Mit.on Yaj.2.143 etc. See the appendix text no.49.

elders and thus comes nearer to the original words in Manu's definition.⁽¹⁾ His definition of post-nuptial gift (anvādheya) and dower (śulka) are as follows : "Whatever is gained by a woman after her marriage from the family of her husband and from the family of her brother as well, is called anvādheya strīdhana."⁽²⁾ "However, Bhrigu gives the name anvādheya to anything received after the sacrament by a woman from her husband or parents through affection."⁽³⁾ "That which is received (by a woman) as a price of the household utensils, of the beasts of burden, of the milch cattle and of making ornaments is well-known as śulka."⁽⁴⁾ However, Vyāsa defines śulka as : "What is brought (by a woman) into the house of her lord is well-known to be śulka."⁽⁵⁾

It is evident from the above definitions that anvādheya or post-nuptial gifts do not include gifts from strangers. It seems a married lady was precluded from accepting gifts from strangers lest she should be in the danger of being seduced by lavish gifts from designing persons. From Kātyāyana's definition it appears that śulka consisted of money which the bridegroom used to pay to the bride for all the house-hold provision including the ornaments which her father made for her. It was thus very similar to what

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- (1) Manu 9.194. The word used in this verse is 'prītikarma'.
 (2) Kat. quoted in Mit. on Yaj. 2.143 etc. See the appendix text no. 51.
 (3) Kat. cited in Vi. Ta. 438 etc. See the appendix text no. 52.
 (4) Kat. cited in Apa. on Yaj. 2.143 etc. See the appendix text no. 53.
 (5) Vyāsa cited in Vi. Mi. 543 etc. See the appendix text no. 76. In Da. Bha. 4.3.21-22 a slightly different reading is accepted to mean whatever is given to woman to induce her to go to her husband's house is śulka. But Da. Bha. p. 150 edited by Sharma contains the first version.

is known today in Gujrat as palluñ. ⁽¹⁾ From Vyāsa's definition it appears that śulka included the dowry or property which presumably the father of a bride bestowed upon her as portion to be taken to her husband's house. ⁽²⁾ None of these definitions, however, include the other well-known meaning of śulka, namely, the bride-price ⁽³⁾ though they may be made out to be vestigial survivals of it in a new social climate.

Then Kātyāyana gives what may be called a cross-division of all these categories into saudāyika and non-saudāyika viz. gifts from the kindred and the rest of strīdhana. He says : "What a married woman or a maiden receives in the house of her husband or of her parents from her brother or parents is called saudāyika strīdhana." ⁽⁴⁾ "As their gifts are given through kindness to ensure the maintenance (of the woman concerned), women acquire freedom by obtaining saydāyika property." ⁽⁵⁾ Another version reads 'from her husband' in the place of the words 'from her brother'. ⁽⁶⁾

(1) See infra.

(2) A custom to this effect exists even at the present amongst the Nattukottai Chetti community and one of the communities of Kathiawar:—see infra pp.418,441.

(3) See infra pp.79.

(4) Kat.cited in Mit.on Yaj.2.143. See the appendix text no.50.

(5) Kat.cited in Apa.on Yaj.2.143. See the appendix text no.57.

(6) The first version is given in Mit.; Smr.Cha.; Ma.Pa.; Vi.Mi. etc. The second version is accepted in the Da.Bha.; Pa.Ma.; Sa.Vi.; Vi.Ta.; etc. But the above limited interpretation on the first version has not been put forward in any of the commentaries except in Smr.Cha.655. See also the etymology of the word discussed therein; it has been followed by the later commentators.

The meaning, of course, is materially affected thereby. The former version would include in the term *saudāyika* gifts only from the parental house whereas the latter brings also gifts from the husband within its fold. The word 'labdham' used in the definition of *saudāyika* literally means 'gained' or 'acquired' and apparently it may include any kind of property coming to a woman from her relations as opposed to property coming from strangers.⁽¹⁾ According to the first version it includes any property coming only from her parents' family.

Vyāsa, however, defines *saudāyika* thus : "That which is obtained by a woman in marriage or after the marriage, from the family of husband or of the father, is called *saudāyika*."⁽²⁾ It seems that this definition would exclude anything which a girl receives before her marriage. There is also a second reading of this definition giving 'brother' in the place of 'the husband' as it is in the case of the definition given by Kātyāyana.

As regards 'ādhipedanika' or gifts on supersession no definition of the category is found in the texts of the *smṛitis*. But Yājñavalkya says : "An equal gift on supersession should be given to a woman who is superseded in case *strīdhana* has not been given to her (already); half of that should be given if (other) *strīdhana* has (already) been given."⁽³⁾ This obviously suggests

(1) For a liberal interpretation of the word 'labdham' see Gajanan v. Pandurang *infra* pp. 286-91.

(2) Vyāsa cited in *Apa.* on Yaj.2.143. See the appendix text no. 75.

(3) Yaj.2.148 see appendix text no. 38. The word 'half' denotes only the balance to be given to her to make her property equal to that given to the second wife - see the *Mit.* on the same verse and Bālabhāṭṭī thereon.

that the husband used to give some property to the second wife and that he had to give equal property to the first wife as well, or at least as much as will place her on an equal financial level with the second wife.⁽¹⁾ It has already been remarked that the category of 'ādhivedanika' was a later introduction. The purpose of introducing this category may be guessed with some certainty. Firstly, it has already been seen that the husband and wife **had** joint interest in the husband's property.⁽²⁾ Some of the Southern inscriptions prove that this joint ownership was in fact exercised even by the royal couples of medieval India so that often a king and his queen used to have independent and equal sovereignty in their kingdom.⁽³⁾ When a contingency of supersession arose it was necessary to adjust the shares of the husband and the two wives. In such case the husband and each one of his wives had equal share in the husband's property so that the husband was required to hand over to the superseded wife her own share in the property. The provision of Yājñavalkya whereby a person who supersedes his wife without any justifiable reason is required to pay one-third of his property to his superseded wife can best be understood on this basis.⁽⁴⁾ The

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- (1) See Apa.on Yaj.2.148. According to Viśvarūpa, however, the money given to the first wife should be equal to the money spent for the second marriage.
- (2) Supra p. 46.
- (3) Supra pp. 47-48.
- (4) Yaj.1.76. See supra p. 42. For this ingenious and the only explanation of the verse the present writer is indebted to his supervisor Dr. J.D.M. Derrett.

husband was required to treat both wives equally by equating each one of them with himself. The device which was originally introduced to protect a woman who was superseded contrary to the rules of the śāstra was probably also utilised to maintain or pacify a woman who was superseded with the support of the śāstra.⁽¹⁾

There are two verses of Kātyāyana which specifically exclude some kinds of property from the import of the term strīdhana. He declares : "That which is given conditionally or (only) for some occasion by the father, mother or the husband of a woman, does not become (her) strīdhana."⁽²⁾ "The husband has dominion over money gained by arts or obtained through affection from elsewhere (i.e. non-relatives or strangers); the rest, however, is called strīdhana."⁽³⁾ As regards the first verse there is no difficulty; for anything which is given to a person on some condition or only for the purpose of celebrating a particular occasion can hardly become the property of such person.⁽⁴⁾ The second text, however, takes some property outside the fold of strīdhana. The word used is 'svāmya' i.e. dominion or control, and not 'svatva' which denotes 'property'. The two words are not necessarily used as co-relatives meaning 'ownership' and 'property'.⁽⁵⁾ But one thing is clear,

(1) According to Da.Bha.4.1.4 ādhivedanika is given to the first wife to satisfy her (pārītoṣikaṃ dhanam). It will be recollected in all these discussions that the feelings of the wife's family were always sympathetically considered by the law.

(2) Kat.cited in Vi.Mi.542. See the appendix text no.55.

(3) Kat.quoted in Vi.Mi.542. See the appendix text no.56.

(4) Manu 8.165; Vi.Mi.542.

(5) See Vi.Mi.542 where the words svāmikatva, svāmya and svatva are used. Apparently Mitra Miśra seems to treat svāmikatva as equal to svatva but distinguishes svāmya from svatva. For these terms see supra pp. 37 and infra pp. 2

namely, that women, according to Kātyāyana, could not freely dispose of the property which is acquired in the above ways at least so long as the husband lived. Kātyāyana does not give any rule as to whether a woman regains her right of free disposal after the husband's death.⁽¹⁾ This verse appears to be an exact counterpart of the verse defining *saudāyika*. Incidentally it ought to be noted that many of the older commentators do not mention this text at all.⁽²⁾ This increases the difficulty in understanding this verse properly.

The foregoing texts have been translated without adopting the views or the explanations given by the commentators of the different schools. A chronological survey of the above texts makes it amply clear that the kinds of properties covered by the word *strīdhana* were continuously increasing. Āpastamba mentions that ornaments belong to the wife and that in the opinion of some (people) the wealth given by her relatives also belongs to her.⁽³⁾ The second kind then seems to be on its way to be included in *strīdhana*. Vasiṣṭha mentions nuptial presents of the mother as devolving upon the daughters suggesting thereby that it was *strīdhana*.⁽⁴⁾ By the time the *Manusmṛiti* was written women's proprietary capacity had increased and many other kinds were added. The succeeding *smṛitis* also added different categories to the

(1) But Bālabhāṭṭa says 'she' does - Bal.255.

(2) The verse has not been cited by Viśvarūpa, Vijñāneśvara nor Aparārka. Consequently Bālabhāṭṭa regards this text as unauthoritative - Bal.255 (the word 'salatve' is to be read as 'samūlatve').

(3) Apa.2.6.14.9; Bau.2.2.49, appendix text nos. 4 and 5 respectively.

(4) Vas.Smr.17.43, see the appendix text no. 8.

description of strīdhana until Yājñavalkya apparently kept the door open for other kinds of property by introducing the word 'ādya' in his description.

It will have been remarked that the wealth obtained by inheritance or partition is not expressly mentioned in any smṛiti as being included in strīdhana. But the right of inheritance or of having a share in partition was not granted to women - or at least to the wife or the widow - for a long time;⁽¹⁾ from the long discussions made by the commentators about the widow's right to inherit her husband's property it appears that she had to fight for the establishment of her alleged right. It is thus natural that this kind of property was not included in strīdhana by the smṛiti literature. Thus the development of the proprietary capacity of women and of the sources comprehended within the term strīdhana appears to have been almost co-extensive and both may well have grown pari passu. ✓

From the survey of these texts two prominent points emerge. Firstly, it is evident that none of them purports to give a definition of strīdhana in a manner similar to that adopted by the later commentators. They simply try to enumerate the different kinds without giving precise categories. Kātyāyana who tries to define these different categories does not try to define the word strīdhana

(1) For the gradual recognition of women's right of inheritance see introduction supra pp. 57-58 ✓

itself. He perhaps rightly understood the difficulty in, and the futility of, defining a growing concept. It follows almost as a logical consequence that the word *strīdhana* never acquired any technical meaning till the era of the commentators.⁽¹⁾ At any given time it was co-extensive with a vague and variable notion about the proprietary capacity which women had at the relevant time and place.

The *smṛiti* texts are, therefore, differently interpreted by the authorities of different schools. To begin with the Benares school, the *Mitākṣarā* which is the highest authority in that school contains the following comment on Yājñavalkya's enumeration : "That which is given by the father, the mother, the husband, or by the brother; that which is presented (to the bride) by the maternal uncle and the rest before the nuptial fire at the time of the marriage ceremony; gift on supersession for which supersession is the cause as will be subsequently mentioned viz. 'Equal gift on supersession etc.';⁽²⁾ and that which is acquired by inheritance, purchase, partition, seizure or finding as designated by the word *et/cetera* (*ādya*);⁽³⁾ all this is termed as *strīdhana* by Manu and the rest. The term *strīdhana* is (used with) derivative (i.e. etymological) and not technical (import) as technical language is improper (at a place) where a derivative interpretation is

(1) Banerjee, however, says that the word always had a technical meaning - Banerjee p.327. The subsequent part of this chapter would prove that he has made a too wide statement.

(2) Yaj.2.148 supra.

(3) This remark is based on Gau.10.38 for which see *supra* pp.35-36. and *infra* pp.245.

possible. (1) Again that six-foldness of strīdhana which is propounded by Manu as in 'That which is given before the nuptial fire etc.' is mentioned to exclude a possibility not of a greater number but of a lesser one. (2) "

(1) Words may have a derivative, traditional or technical meaning. A derivative (yauḡika) meaning is that which is consistent with the etymology of the word e.g. 'sodara' which denotes a uterine brother. A traditional meaning is a meaning acquired by tradition; it either restricts the derivative meaning of a word or is inconsistent with it. In the former case it is more properly known as derivative-traditional (yogarūḡha). Thus the word 'pañkaja' (lit. that which is born in mud) denotes only lotuses although it may also mean frogs. Similarly the word 'aśvakarṇa' denotes a kind of tree and not an ear of a horse which is its etymological meaning. Technical meaning is one which is expressly attached to a particular word in a particular science or treatise. For instance the words 'ach' and 'hal' in Pāṇini's grammar denote all the vowels and consonants respectively. See ^{the} Nyāyakośa pp.573-74, 908, 910, 498-99 for yogarūḡha, rūḡha, samjñā, pāribhāṡiku etc. See also Jayatīrth's Tatvaprakāśikā on the Madhvabhāśya on Bra. Su.1.1.2, the Chandrikā on the same passage in the Tatvaprakāśikā and the Prakāśa on the same passage. See also introduction of the editor to Vol.III of the Mysore edition (1920) of the Madhvabhāśya. The meaning of saudāyika in Hindu law on strīdhana may thus be called technical. Viśveśvara in his Subhodhinī explains this clearly : "With the authority of Manu's statement viz. 'strīdhana is known to be six-fold' some persons describe that the word strīdhana has a non-derivative meaning as in the case of the word 'aśvakarṇa' and is restricted only to the six kinds mentioned by Manu. This is improper. For it would come in conflict with the other texts and the usage of the wise; and, derivation has preponderance over the unestablished usage (about the meaning of a word)." - Subhodhinī 76-77. Mr. Gharpure's translation (pp.193-94) is not fully intelligible. See also Bālabhaṡṡī p.253 for the same argument.

(2) Mit.on Yaj.2.143.

Vijñāneśvara then gives the definitions of 'adhyagni', 'adhyāvā^{ha}ṇika', 'prītidatta' and 'saudāyika' as given by Kātyāyana. Commenting on the next verse of Yājñavalkya he explains 'bandhudatta' or gifts given by kindred as 'that which is given by the relatives of the father and mother of the bride (lit.daughter).' The definition of śulka is 'that on the receipt of which a girl is given in marriage.' Vijñāneśvara then explains the term 'anvādheya' by giving Kātyāyana's definition and adding his own etymological explanation of the word viz. 'that which is given after the marriage'. Then he adds that the three categories given in this verse are connected with the verb 'is well-known' in the preceding verse, which brings them within the fold of strīdhana.

Apart from the question whether Vijñāneśvara is justified or not in expanding the word 'ādya' (etcetera) to such a wide extent it is clear that he defines strīdhana in an unequivocal manner and includes every kind of woman's property in the expression strīdhana. To justify his broad stand he counters all opposition by stating that the expression bears an etymological sense. Whatever might have been in the mind of Yājñavalkya when he used (if he did) the

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- (1) In Mit. mentioned as 'adhyāvahanika'.
 - (2) The word 'bandhudatta' would include gifts from the father and mother as well which have been mentioned in the preceding verse; but their separate enumeration may be justified on the basis of a sanskrit maxim known as 'gobalivardanyāya' - see Smr.Cha.652.
 - (3) Mit.on Yaj.2.144.
 - (4) Ibid. According to Vi.Mi.543 the words adhyagni etc. have both an etymological and technical meaning. The reason which he gives is not very clear. See also translations - Setlur part II p.440. The reason, however, appears to be that gifts only before the nuptial fire are to be included in the word adhyagni whereas etymologically gifts given before any fire could be included. See infra p.193.
 - (5) Yaj.2.143 supra.

word 'ādyā' there can be no doubt as regards the intention of Vijñāneśvara in expanding that word to include almost every kind of property not expressly mentioned in the smṛiti text. It is also important to note that Vijñāneśvara does not refer to any other enumeration except the one given by Manu and does not refer to the text of Kātyāyana which excludes wealth gained by arts and gifts from strangers from the fold of strīdhana. Moreover it ought to be borne in mind that in interpreting the word strīdhana etymologically he is by no means merely imaginative; for, except śulka all the categories of strīdhana have been almost unanimously defined by all authors on a etymological basis. There is, therefore, no reason why the word strīdhana itself should not be understood in its etymological sense.

Before turning to the other authorities it may be stated at the outset that there is a general consensus of opinion amongst the authorities of all the schools that the word 'six-fold' appearing in Manu's definition is not restrictive but only illustrative.⁽²⁾

Vijñāneśvara appears to have been followed all over India on this point. Even his extension of the word 'ādyā' so as to include property obtained by inheritance etc. has been expressly followed by Aparārka, Viśveśvara, Mādhava, Kamalākara, Pratāpa Rudra,

(1) The explanation given by Bālabhaṭṭa and Viśveśvara in their commentaries on the Mitākṣarā confirms this conclusion.

(2) See Da.Bha.4.1.18; Smr.Cha.652; Pa.Ma.368; Vi.Ra.523; Vi.Chi.138-39; Ma.Ra.375; Vi.Cha.76; Vya.Ma.152; Vi.Ta.438; Sa.Vi.379; Vi.Mi.541; Da.Kra.Sam.17-18; Ba.253 etc. But see Nandana supra p.63. Many of the ancient authors like Bhāruchi, Viśvarūpa, Lakṣmīdhara, Kavikānta Sarasvati, Viśveśvara do not give this remark which is almost invariably found in the later commentaries. But Aparārka and even Viśveśvara appear to be in favour of this remark - see Apa.on Yaj.2.143 and Ma.Pa.670.

Bālabhaṭṭa and Sarvoru Śarman.⁽¹⁾ It has been expressly repudiated only by the authors of the Bengal school.⁽²⁾ Others do not attempt to refute it although it must be stated that they do not come out with an open support.⁽³⁾

The Vīramitrodaya of Mitra Miśra is the next important authority of the Benares school. After giving Manu's enumeration the author remarks that the number six is only a denial of the less and not restriction on the greater number.⁽⁴⁾ He then states that Viṣṇu also mentions 'six-fold' strīdhana⁽⁵⁾ and gives his enumeration. Then he adds Nārada's enumeration and remarks that the expression strīdhana has an etymological meaning. In furtherance to this opinion he defines strīdhana as property the owner of which is a woman (strīsvāmikaṃ dhanam).⁽⁶⁾ He mentions, apparently with approval, that by the word 'ādya' Vijñāneśvara has included property by inheritance etc.⁽⁷⁾ He then cites the two verses of Kātyāyana⁽⁸⁾

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- (1) Apa.on Yaj.II.143; Ma.Pa.670; Pa.Ma.368; Vi.Ta.440; Sa.Vi.379; Vi.Mi. (tīkā on Yaj.2.143); Bal.252; Vi.Sa.f.67(b).
 (2) See infra.
 (3) However, at one place even Devaṇṇa appears to support the opinion of Vijñāneśvara - see infra pp. 97-98.
 (4) Supra p. 80.
 (5) Vi.Mi.541. This is indeed surprising. Evidently Mitra Miśra treats the whole compound 'given by the father, the mother, son or brother' as one kind of strīdhana. It is interesting to note that if this method of treating one compound as one kind of strīdhana is adopted the enumeration as contained in both the verses of Manu (9.194-95) and of Yājñavalkya (2.143-44) gives only a six-fold strīdhana. Other commentators say that Viṣṇu has enumerated more than six kinds - Smr.Cha.652; Ma.Ra.375; Vya.Ma.153 etc.
 (6) Vi.Mi.542. Aparārka while commenting on Yaj.2.143 makes a similar statement and uses the word 'strīsvāmika'.
 (7) Vi.Mi.542.
 (8) Supra p. 74.

which declare some kinds of property to be not strīdhana. On the authority of Manu⁽¹⁾ he accepts that the first verse naturally excludes conditional gifts etc. from strīdhana as such gifts do not create ownership on the donee at all. But as regards the second text Mitra Miśra remarks : "Here there is no denial of (such property) being woman's property. But there is a denial of its distribution etc. which might otherwise be effected (by the choice of the woman). Hence in the latter text it is said that the husband has dominion over the same. The meaning is that the husband and not the wife has freedom to utilise such property."⁽²⁾

As regards 'anvādheya' he accepts the second reading.⁽³⁾ He also remarks that the words 'adhyagni' etc. have both a technical and derivative meaning 'as they are not used in those kinds of strīdhana'.⁽⁴⁾ He seems to accept the explanation of śulka given in the Madanaratnapradīpa viz. śulka is that which is accepted, in the form of ornaments for the girl, from the husband etc. as a condition for offering the girl and as the price for the household utensils etc.⁽⁵⁾ He accepts also Vijñāneśvara's definition adding, however, that the intention must be to benefit the daughter as it would not

(1) Manu 8.165; Vi.Mi.542.

(2) Vi.Mi.542. So the husband has svāmya but the wife has svatva. It is not possible to state whether Mitra Miśra intended to distinguish between strīsvatva and strīsvāmika. For discussion about svatva see ~~Supra~~ pp. 37 and ~~infra~~ pp. 74.

(3) For definition see supra pp. 70.

(4) Supra p. 79 note no. 4.

(5) Vi.Mi.543. See also Ma.Ra.375. It must be stated here that more often than not Mitra Miśra follows Madanasimha in the same way in which Vāchaspati Miśra follows Chanḍeśvara.

be strīdhana (i) the daughter has no ownership in the same. ⁽¹⁾ He also accepts the definition of śulka given by Jīmūtavāhana. The basic reasoning behind the acceptance of all the definitions appears to be that whatever is given to a bride or accepted on her behalf is her strīdhana.

He then cites the text of Kātyāyana referring to the provision of maintenance to be made for a woman by her father etc. : "The father, the mother, the husband, the brother or the kinsmen shall, according to their capacity, give to women strīdhana not exceeding two thousand (pañas) but not immoveables." ⁽²⁾ He explains that property other than immoveables and not exceeding two thousand copper coins should be given to women for their maintenance every year. He also refers to Devala's enumeration and connects the above verse as an explanation of the word 'maintenance' in Devala's enumeration. ⁽³⁾

(1) Vi.Mi.543. The definition given in the Mitākṣarā has been accepted also in Bha.Vi.ma.f.9(b) and Da.Da.Slo.ms.f.43(a).

(2) Kat. cited in Vi.Mi.544. See the appendix text no.54. See also similar text of Vyāsa stating that 'dāya' (inheritance) up to two thousand should be given to women - text quoted in Apa.on 2.143 (see the appendix text no. 77). Dr. Altekar holds that this figure two thousands refers to silver paṇas and that the purchasing power of two thousand silver paṇas in those days was equal to that of Rs. ten thousand of today - (1938) The position of women in Hindu Civilisation p.305. But the comments of Devaṇṇa and Mitra Miśra on Kātyāyana's text and of Aparārka on Vyāsa's text conclusively prove that the paṇas were copper coins and they were to be given every year. See also Dr.D.M.Derrett : A strange rule of smṛiti and a suggested solution J.R.A.S.1958 p.17, wherein the author ~~shows~~ that the figure two thousand was arrived at not arbitrarily but with the help of an actual calculation to the effect that the sum should be sufficient for the maintenance of a widow during all her normally expected span of life, namely, 30-40 years.

(3) See supra p. 66 for Devala's verse.

It is not necessary to examine all his comments further. It is clear that Mitra Miśra is of the opinion that the expression *strīdhana* includes all kinds of property belonging to women. The above extracts are given from his original treatise the *Vīramitrodaya*. In his commentary on the *smṛiti* of Yājñavalkya he confirms this view more emphatically. After having termed all the enumerated categories as being *saudāyika* he further comments that the word 'ādya' includes property inherited by a woman from her husband and that such property excludes only that property which her husband held jointly with other persons.⁽¹⁾ He also repeats that the word *strīdhana* has an etymological meaning and not a technical one as it is improper to adopt a technical meaning where it is possible to accept the etymological meaning of a word.⁽²⁾

In the *Madanapārijāta*, which is a very old authority of the Benares school,⁽³⁾ the topic of *strīdhana* receives a very

(1) Vi.Mi.Tīkā on Yaj.2.143-44 : " ...Etatsarvaṃ *strīdhanam* *saudāyikaṃ* *parikīrtitaṃ*. *Ādyapadena* *bhartrīmaranātsaṅkrāntasya* *dhanasya* *saṅgrahaḥ*. *Chakāreṇa* *tatparigṛhītavaśanālankārād-* *isamuchchayaḥ*. *Evakāreṇa* *bhartrasādhāraṇasvatvasya* *vyavach-* *chhedah.*"

(2) Ibid. h

(3) In the *Darmakośa* the date of the *Madanapārijāta* is given as being 1360-1390 A.D. But the work has been referred to in the *Smṛitisāra* of Harinātha which is dated in the *Dharmakośa* as being 1300-1350. Therefore the former appears to be earlier than the works of the fourteenth century. The author of *Pārijāta* is Viśveśvara Bhaṭṭa who has also written a commentary called *Subhodhinī* on the *Mitākṣarā* of Vijñāneśvara. It is not surprising, therefore, to find that the views in the *Subhodhinī* and the *Pārijāta* coincide with each other. The *Madanapārijāta* is also a great authority of the Mithila School - see *infra*. p. 446-47.

cursory attention but the author gives a plain and simple explanation of Yājñavalkya's enumeration : "By the word 'etcetera' (ādyā) that which is acquired by spinning, purchase, partition, seizure, or by finding of a treasure etc. is included."⁽¹⁾ It is obvious that the author of the Madanapārijāta also includes all property of women in the word strīdhana especially as after having explained the word 'ādyā' he again adds to his detailed list another word 'ādi' which has the same meaning as the word 'ādyā'.

The authority next in importance in the Benares school is the Vivādatāṇḍava of Kamalākara. His general approach towards the subject is very similar to that of Mitra Miśra and nothing very special is to be noted about him.⁽²⁾ After mentioning the enumeration of Yājñavalkya and his provision about gift on supersession Kamalākara remarks : "By the word etcetera (ādi) that which is acquired by inheritance, purchase, partition etc. (is included)."⁽³⁾ No comment on this explanation is necessary.

He, however, mentions an additional text of Vyāsa : "Whatever is given to the bridegroom with some intention at the time of the marriage, becomes the property of the bride and is not to be divided by the relatives."⁽⁴⁾ Kamalākara apparently follows Jīmūta⁽⁵⁾ and comments that the intention in such case must be to benefit the girl; otherwise, it would not become strīdhana at all.

(1) Ma.Pa.670. For translation see Setlur p.53 where it is slightly incorrect.

(2) See Vi.Ta.437-446. At p.437 the author introduces his subject: "Strīdhane prochyate bhāgo yatra yuddham kachākachi/" which sufficiently denotes the intricacy which the subject had developed by his time.

(3) Ibid 440.

(4) Ibid 441. See Dha.kośa P.123).

(5) Infra p.108.

He also mentions a text of Devala which appears to have a similar purpose.⁽¹⁾ These two texts of Vyāsa and Devala disclose a noteworthy attempt to create an additional category of strīdhana which will be discussed later on.

In the meanwhile it may conclusively be asserted that according to the authors of the Benares school the expression strīdhana has an etymologically derivative meaning and includes all kinds of woman's property. Vijñāneśvara has been very closely followed by them in this respect. However, while discussing the law of the Benares school it must be kept in mind that the question whether a particular kind of property is strīdhana or not is far different from the question whether a woman is entitled to dispose freely of all the categories of her strīdhana and the latter will be discussed in the next chapter.

The text of Vyāsa cited by Kamalākara raises an important question as to whether and how far does a nuptial gift to a bridegroom become the strīdhana of the bride. It is well-known that property acquired by valour, gains of learning and property acquired marriage form the important categories of a male's impartible property. Manu and Yājñavalkya call this nuptial property as 'audvāhika'.⁽²⁾ But it appears that deliberate attempts were made

(1) Vi.Ta.442. One more addition of Kamalākara may be mentioned here. According to him ornaments only of a negligible value are strīdhana. In case they are very valuable they can be partitioned if the woman has an excessive share on account of them. - Vi.Ta.446.

(2) Manu 9.206; Yaj.2.118.

by the later authors to transform this male's impartible property into his wife's strīdhana in the same way in which bride's price, which originally formed the property of the father of the bride, was reduced to one of the categories of strīdhana i.e. śulka.⁽¹⁾ Nārada mentions this third category as 'bhāryādhana' (lit. property of the wife).⁽²⁾ Commenting on this word 'bhāryādhana' Harinātha says that it denotes saudāyika⁽³⁾ and Bhavasvāmi says that it denotes strīdhana.⁽⁴⁾ They do not give these explanations without any authority behind them; for Vyāsa terms this very category as 'saudāyika'⁽⁵⁾ and Kātyāyana calls it strīdhana.⁽⁶⁾ Commenting on this word saudāyika used by Vyāsa, Chandeśvara says that it is the same saudāyika which has been defined by Kātyāyana as "What a married woman or a maiden receives .. etc."⁽⁷⁾ i.e. strīdhana over which a woman has independent right of disposal.

It is well-known that in the brāhma and prājāpatya forms of marriage the bridegroom gets some gift from the family of the bride which presumably becomes his own property. In Southern India and espacially in Kerala such gift to the bridegroom is called strīdhanam.⁽⁸⁾ On the other hand, there is also a custom amongst

(1) supra pp. 56.

(2) Na.Smr.16.6 & Na.Sam.14.6

(3) Smr.Sa.ms.f.60.

(4) Na.Sam.14.6.

(5) Vyāsa cited in Apa.on Yaj.2.119 etc.

(6) Cited in Vi.Ta.344 etc. See also Prajāpati cited in Sa.Vi. 368 who mentions strīdhana in addition to audvāhika.

(7) Vi.Ra.500. For the definition see supra p.

(8) See Vishnu v. Krishnan (1909) 25 T.L.R.196 at 213-14. But for a contrary view see ibid at pp.206-8.

some of the communities in India according to which the parents of the bride hand over some property to the bridegroom for the benefit of the bride. This is also called *strīdhana* in the South.⁽¹⁾ In Travancore the Malayala Brahmin Regulation provided that '*stridhanom*' received by a Malayala brahmin should be treated as being the joint property of the husband and wife.⁽²⁾ In Mysore such property has been declared to be the exclusive property of the woman.⁽³⁾ But from the discussion made above it appears that the *śāstrakāras* had long anticipated the move which was taken by the Mysore legislature and were coming very close to the position that such property should be treated as *strīdhana* of the bride. The text of Vyāsa cited by Jīmūta and Kamalākara shows a step in transition so that Vyāsa wanted to include into *strīdhana* only that property which was handed over to the bridegroom for the benefit of the bride.

In examining the law of the Bombay school distinction ought to be made between the area in which the *Mitākṣarā* supersedes the authority of the *Mayūkha* and the area where the *Mayūkha* is the paramount authority.⁽⁴⁾ Much confusion has been caused in ascertaining the law of the Bombay school on account of a uniform belief of all scholars and judges that there is very little difference

(1) See *supra* p. 71 and *infra* pp. 418, 441.

(2) The Travancore Malayala Brahmin Regulation III of 1106 (1931) s.21.

(3) The Mysore Hindu Law Woman's Rights Regulation X of 1933 s.10 (3). This section covers both *sulka* i.e. bride's price and property which is given to the bridegroom by the bride's family i.e. property which is known as *varaśulka* or *strīdhanam* in the South, *hunḍā* in Bombay and *dahej* in the Northern India.

(4) *Mayne* p.48.

between the Mitākṣarā and the Mayūkha as regards the meaning of the word strīdhana. It has always been thought that Nīlakaṇṭha divides strīdhana into technical strīdhana and non-technical strīdhana, includes in the former division all the categories mentioned in the smṛitis, and includes in the latter division all the categories like property acquired by inheritance, purchase, partition etc. which have been included in the word 'ādya' by Vijñāneśvara and other authors.⁽¹⁾ That this supposition is entirely wrong can be seen from a careful and comparative analysis of the text of the Mayūkha.

Nīlakaṇṭha begins with the enumeration of Manu and says that as borne out by the word 'ādya' in Yājñavalkya's verse the word 'six-fold' in Manu's verse denotes only a denial of the less.⁽²⁾ To elucidate his point further he mentions the 'additional' categories mentioned by Viṣṇu.⁽³⁾ Then he gives the definitions of the different categories of strīdhana. For śulka he accepts the definition of Kātyāyana and remarks : "The meaning is, when the bride does not (as usual) obtain household utensils and the rest, then whatever is given to her at the time of her marriage as their value, is termed

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- (1) W.& B. 4th Edi.pp.258, 485-86; Banerjee pp.334, 505; Bhattacharya 2nd Edi.p.566; D.N.Mitter : Position of Women in Hindu Law (1912)p.511; S.Venkatarama Ayyar : Outlines of Hindu Law (1931)p.408; H.D.Cornish : A Short Manual of Hindu Law p.144; History of Dharmaśāstra Vol.III pp.782, 796-99; Kane's Notes to Vya.Ma.157; Gour's Hindu Code 3rd Edi.pp.1561-62; Mayne 11th Edi.p.733; Gupte 2nd Edi.p.587 etc.
- (2) "...tena Yājñavalkyīyamādyapadaṃ saṅgachchhate." - Vya.Ma. 152-53.
- (3) "Viṣṇuśchādhikamāha." - Vya.Ma.153.

her perquisite."⁽¹⁾ Then he explains ādhivedanika and then gives the provisions of Vyāsa and Kātyāyana about two thousand paṇas to be given annually to a woman for maintenance.⁽²⁾

Then to show that property obtained from non-relativās - even if they be friends - is not strīdhana⁽³⁾ he cites the verse of Kātyāyana which specifically declares such property to be not strīdhana.⁽⁴⁾ He then remarks that the verse of Manu which declares women to be incapable of owning any property⁽⁵⁾ refers to the two categories mentioned in the above verse of Kātyāyana. He further says that it is proper to hold that this Manu's verse denotes also the lack of independence (asvātantrya) on the part of a woman as regards 'ādhivedanika etc.'⁽⁶⁾

Up to this point Nīlakaṇṭha nowhere says expressly that strīdhana has an etymological meaning and that it includes property obtained by inheritance, purchase, partition etc. - an explanation which has been unambiguously given by Mādhava, Mitra Miśra, Pratāpa Rudra, Kamalākara and several other authors.⁽⁷⁾ When he says that the word 'ādyā' shows that the word 'six-fold' is only a denial of the less he means nothing more than to say that many other categories are spoken of by other authors like Yājñavalkya, Viṣṇu etc. This

(1) "Grihopaskarādyaalābhe tanmūlayaṃ kanyādānakāle kanyāyai dattaṃ taśśulkaṃityarthaḥ." - Vya.Ma.153.

(2) Ibid 154.

(3) "Silpaprāpte pitrādibhinnaśakhyādiprāpte'pi strīdhanatvaṃ nāstītyāha." - Vya.Ma.154.

(4) Supra p. 74.

(5) Manu 8.416 supra p. 50.

(6) "Ādhivedanikādiṣvāpyasvātantryaparamiti tu yuktaṃ" - Vya.Ma.155.

(7) Supra pp. 80-81.

explanation is borne out by his next sentence, namely, "Viṣṇu also has stated additional categories." Jīmūta and other authors of the Bengal school also give a similar explanation of the word 'six-fold' (ṣaḍridha).⁽¹⁾ The explanation given by Vāchaspati Miśra, the author of the Vivādachintāmaṇi, comes very close to the one given by Nīlakaṇṭha. Vāchaspati says that the word sixfold is only a denial of the less; to substantiate his remark he further states that Ādhivedanika is the 'seventh' variety and gives the enumeration given by Viṣṇu.⁽²⁾ Even the words 'Ādhivedanika etc.' used by Nīlakaṇṭha do not mean Ādhivedanika and other property obtained by a woman by inheritance etc. They denote all kinds of property obtained by a woman from her husband and Nīlakaṇṭha wants to suggest that such property is not at the free disposal of a woman.⁽³⁾ This inference is supported by the fact that after making the above-mentioned remark the author refers to the definition of saudāyika given by Kātyāyana to show the property which is at the free disposal of a woman and accepts that version of the verse which restricts the meaning of the word saudāyika to property received from the family of the parents only.⁽⁴⁾ He then cites the text of Nārada which declares that a woman cannot freely dispose of immoveable property given to her by her husband.⁽⁵⁾ The words 'Ādhivedanika etc.' have

(1) Infra p. 109.

(2) Infra p. 103. See also note to p. 80 mentioning some other authorities. For a similar interpretation see infra p. 105.

(3) Even Ādhivedanika is a kind of bhārṭṛidatta. For a woman's right of disposition see the next chapter.

(4) Vya.Ma.155. For the verse see supra p. 71.

(5) See infra.

been also used by Vāchaspati Miśra, the author of the Smṛtisārasaṅgraha, who divides strīdhana into technical strīdhana i.e. strīdhana which has been mentioned by the sages, and that which is etymological.⁽¹⁾ It is evident that this author uses this phrase to denote only technical strīdhana and therefore it would not be improper to think that Nīlakaṇṭha also meant the same thing by these words.

It is also important to note here that whereas property acquired by labour etc. and gifts from strangers are included in strīdhana by Mitra Miśra⁽²⁾ and whereas even the authors of the Bengal school admit that the woman has at least some kind of ownership in the same,⁽³⁾ Nīlakaṇṭha openly suggests that the woman has no ownership in such property and that it becomes the property of the husband.

In his provisions concerning succession the author uses the phrase 'pāribhāṣika strīdhana' although it must be noted at the same time that he never uses the phrase 'apāribhāṣika strīdhana' (non-technical strīdhana) which is nowadays too readily ascribed to him. After having laid down the whole scheme of succession which is far different from the one given by the Mitākṣarā,⁽⁴⁾ Nīlakaṇṭha makes a long comment as follows :

"This right of inheritance of the daughter etc., in the mother's property pertains only to the above-mentioned pāribhāṣika

(1) Smr.Sa.Sam.ms.f.44(a). See infra p.117.

(2) Supra p.82.

(3) Infra pp.109, 112-14.

(4) Infra pp.352-56.

strīdhana i.e. adhyagni, adhyāvahanika etc. If it is understood as pertaining (also) to the property which is merely owned by the mother then the technical language (i.e. the enumeration) would become purposeless." Therefore the texts of Bṛihaspati, Gautama etc., namely, 'Strīdhana should devolve upon the issue...', 'Strīdhana devolves upon the daughters ...' etc. which have been referred to above and which contain the word 'strīdhana' apply to pāribhāṣika only. On account of the maxim of the desirability of tracing any two similar texts to the same source, those texts which do not contain this word but have a similar purpose in view e.g. '...should divide maternal estate...' etc. also apply to the same (i.e. pāribhāṣika). But the text of Yājñavalkya : 'The sons should equally divide the property and debts after (the death of) their parents...' applies to property acquired by partition, spinning etc. which is beyond the scope of the pāribhāṣika. Therefore, despite the existence of daughters, sons and others alone should get their mother's property which falls beyond the scope of the pāribhāṣika. However, in default of issue Yājñavalkya makes a specific provision concerning pāribhāṣika strīdhana : 'In the event of a woman dying childless her relatives should take her strīdhana'." (1) This whole

(1) "Ayaṃ duhitṛādīnāṃ mātṛidhanādhikāro'dhyagnyadhyāvahanikamityādīpūrvoktapāribhāṣikastrīdhana eva. Mātṛisvāmikadhanamāt-raparatve paribhāṣāvaiyarthyaṃ. Tena 'Strīdhanam syādapaty-ānām...', 'Strīdhanam duhitṛīnām...' ityādīni pūrvoktāni strīdhanapadavanti BṛihaspatiGautamavachanāni pāribhāṣikapar-ānyeva. Yāni tu strīdhanapadābhāve'pyekārthakāni 'Bhajeran-mātrikaṃ riktham...' ityādīni tānyetatparānyeva. Ekamūlakal-panālāghavāt. Yattu 'Vibhajeran sutāḥ pitrorūrdhvaṃ riktham-riṇam samam' iti Yājñavalkyoktam tatpāribhāṣikātiriktavibh-

comment shows that according to Nīlakaṇṭha there is nothing like non-technical strīdhana. He refers to such property as mother's property or property which is merely owned by the mother - a phraseology which is very commonly used by the authors of the Bengal school to denote property which, according to them, is not strīdhana at all. (1)

Secondly, Misru Miśra, the author of the Vivādashandha, shows, in the same way as Nīlakaṇṭha does, the danger of the technical language becoming futile and purposeless in case the word strīdhana is held as being capable of including categories which are not mentioned in the smṛitis. He specifically limits the meaning of the word strīdhana to categories which are enumerated in the smṛitis. (2) The reasoning of both these authors being similar it is evident that according to Nīlakaṇṭha also the word is limited to the enumerated categories.

Thirdly, all texts which lay down a special line of succession to female's property are applied by Nīlakaṇṭha only to the pāribhāṣika categories or the so-called technical strīdhana. As

āgakartanādilabhāparam. Tena pāribhāṣikātiriktaṃ mātṛidhanam duhitṛisatve putrādaya eva labheran. Ubhayavidhasamtatyabhāve tu pāribhāṣikastrīdhanam prakṛitya viśeṣamāha Yājñavalkyaḥ 'Atītāyāmaprajasi bāndhavastadāpnuyuh'. - Vya.Ma.160. For the texts of Bṛihaspati, Gautama and Manu see infra chapter IV. The text of Yājñavalkya is Yaj.II.117.

- (1) See infra pp. 113, 117. The phrase "mātṛisvāmikadhanamātra" should really be "mātṛisvāmikamātradhana". See the phrase "strīsvatvāspadamātra" used in Smr. Sa.Sam.ms.f.44(a).
- (2) Infra pp. 105-6. A cursory perusal would show that the position taken by these two authors is almost identical.

regards succession to other categories of female's property he refers to the text of Yājñavalkya which applies to succession to male's property, laying down thereby that these non-enumerated categories devolve like male's property upon son, son's son etc. in preference to daughter, daughter's daughter etc. This is also clear from the fact that he does not give a further line of succession to non-enumerated categories but deals with the enumerated categories only.

Fourthly, proceeding on the hypothesis that Nīlakaṇṭha divides strīdhana into technical and non-technical strīdhana it must be noticed that Raghurāma Śiromaṇi, the author of the Dāyabhāgārth-adīpikā, appears to be the only other author who divides strīdhana in this way. But it is evident from his further elucidation as also from the line of succession which he prescribes for apāribhāṣika strīdhana that in his opinion apāribhāṣika strīdhana is really not strīdhana at all.⁽¹⁾ Nīlakaṇṭha does not go to the extent of giving expressly a category called apāribhāṣika strīdhana, while, on the other hand, he refers to the enumerated categories as 'pāribhāṣika strīdhana' and sometimes merely as 'pāribhāṣika' which shows that he uses the word pāribhāṣika as a synonym for strīdhana itself.

Fifthly, as it has been held that the preponderance of the Mayūkha in its own area is due to the fact that its author has incorporated into his treatise the customary law of the locality,⁽²⁾ it must be stated that the customary law of Gujrat has been in favour

(1) Infra pp. 115.

(2) Chandika Baksh v. Muna Kvar (1903) 29 I.A.70; Meghaji v. Anant A.I.R.1948 Bom.396

of the above interpretation put upon the provisions of Mayūkha concerning strīdhana. In the Gujrat Caste Rules⁽¹⁾ collected by Borradaile it is found that out of the two hundred castes questioned by Borradaile on several points relating to Hindu law a hundred have replied that property which a daughter inherits from her father devolves, after her death, upon the heirs of the father; fortyseven castes have given an opinion in favour of the husband of the daughter and the rest of the sixtyeight castes either did not give any reply or said that the daughter does not inherit at all or that the matter should ^{be} decided in accordance with the śāstra.⁽²⁾ It is evident from these replies that according to the majority of the castes in Gujrat a daughter takes only limited estate in the property which she inherits from her father which, in other words, means that property inherited by a woman is not strīdhana. It is no wonder, therefore, that Nīlakaṇṭha ventured to differ from the Mitākṣarā as regards the meaning of strīdhana and gave only a limited significance to it. This view of the Mayūkha was, as we shall see, not current in the Anglo-Hindu law.

In the Southern school or the so-called Draviḍa school the leading authorities besides the Mitākṣarā are the Smṛitichandrikā, the Parāśaramādhaviya, the Vyavahāranirṇaya and the

(1) For information about ^{these} see infra pp. 626-27.

(2) For this statistics and some more arguments in favour of this point see B.K. Acharyya : "Codification in British India T.L.L.(1912) p.346.

Sarasvativilāsa.⁽¹⁾ As regards the Smṛitichandrikā it must be admitted that Devaṇṇa, its reputed author, does not expressly state that the word 'ādya' includes property obtained by inheritance etc. nor does he assert that the expression strīdhana is used etymologically and not technically.⁽²⁾ As regards śulka he accepts the definition of Kātyāyana. The second verse of Kātyāyana which excludes certain property from the import of the expression strīdhana is connected with the verse of Manu which declares women to be incapable of owning any property. This shows that according to him acquisitions by labour and gifts from strangers do not create any kind of proprietary interest of the woman concerned.⁽³⁾ All these points show a big deviation from the Mitākṣarā theory of strīdhana and one may think that according to Devaṇṇa strīdhana consists only of categories mentioned in the smṛitis. But at another place in the Smṛitichandrikā there is a small parenthetical remark which leads the reader to an exactly opposite conclusion. Dealing with the mother's right to succeed to her son's property Devaṇṇa remarks : "Whatever the mother takes she takes for herself like the strīdhana

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- (1) The Vyavahāranirṇaya of Varadarāja is no doubt an important and an extensive treatise of the Southern school; but as the author rarely gives comments of his own his work often dwindles down to a mere anthology of selected and categorically arranged verses of the smṛitis. For ascertaining the connotation of the word strīdhana Varadarāja is of little help. - See Vya.Ni.pp. But for succession to strīdhana see infra pp.376-72.
- (2) For a general discussion see Smr.Cha.651-54.
- (3) Smr.Cha.654. To the same effect are Ma.Ra.376; Vya.Ma. 154-55 etc. For 'nirdhanatva' smṛitis see introduction pp.50.

called adhyagni and the like, and not for the benefit of both herself and her husband."⁽¹⁾ The passage suggests that according to the author property which a mother inherits from her son is her strīdhana. This inference is fortified by the fact that both according to Mādhava and Pratāpa Rudra property inherited by a woman is strīdhana.

The Parāśaramādhaviya is in full concord with the Mitākṣarā as regards the expansion of the word 'ādya' in Yājñavalkya's text. Commenting on the enumeration of Yājñavalkya Mādhava says : "By the word 'etcetera' (ādya) that which is obtained on the bridal procession or by inheritance or sale (is included)."⁽²⁾ He then adds that the number six is a denial of the less.⁽³⁾ The whole treatment is similar to that of the Benares school. It is surprising to note that according to Banerjee the Mādhaviya gives only a 'limited

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- (1) Smr.Cha.689; translation XI.iii.8 in Krishnasawmy Iyer's edition is reprinted in Setlur part I p.290. The context of the passage shows that Devaṇṇa is refuting the opinion of one Śambhu according to whom such property belongs to both the mother and the father. Banerjee refers to this passage and remarks "...from this passage it has been sometimes inferred that inherited property does not rank as strīdhana." It is surprising that he does not declare his own opinion upon the interpretation of this passage which is obviously in favour of inherited property being treated as strīdhana. - Banerjee p.336.
- (2) Pa.Ma.368. See also ~~Bombay~~ Sanskrit Series edition p.547. where the same reading is given. But the translation given by Setlur p.343 omits the words 'by inheritance', The same is the case with Burnell's translation quoted by Banerjee (p.330). It seems Banerjee depended only on the translation of the treatise!
- (3) Pa.Ma.368.

signification' to the word 'ādya'.⁽¹⁾ With great respect it must be added that the translation given by him is not in accord with the original text of the Mādhavīya, the correct translation of which has been given above. Not only does Mādhava expand the word 'ādya' in the way in which Vijñāneśvara does but he also defines wealth given by kinsmen (bandhudatta), śulka and gifts given after the marriage (anvādheya) exactly in the same way as Vijñāneśvara does. This firmly establishes his affinity to the Mitākṣarā.⁽²⁾

There is one important difference between the provisions of the Benares school and of the Mādhavīya, namely, the author refers to the two verses of Kātyāyana about conditional gifts etc. and holds that property mentioned in both the verses is not strīdhana at all.⁽³⁾ On this point he seems to agree with Devaṇṇa, Madanasimha, Dalapatirāja, Nīlakaṇṭha and the authors of the Bengal school.⁽⁴⁾ Thus it may be concluded that according to Mādhava all property which belongs to women except gifts from strangers and property acquired by women by labour is strīdhana.

Coming to the Sarasvatīvilāsa it is clear that Pratāpa Rudra, its ~~reputed~~ author, follows the Mitākṣarā in expanding the word 'ādya' to include property obtained by inheritance, purchase,

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- (1) T.L.L. (1878) pp.330, 335. At p.359 Banerjee expressly mentions that inherited property is not included by Mādhava in strīdhana..
- (2) Pa.Ma.368, translation Setlur pp.343-44.
- (3) Pa.Ma.370.
- (4) Smr.Cha. 653-54; Ma.Ra.376; Nri.Pra.237; Vya.Ma.154-55 etc. See also infra.

partition etc.⁽¹⁾ As regards śulka he seems to accept the definitions both as given in the Mitākṣarā and the one given by Kātyāyana which is accepted also in the Smṛitichandrikā but he seems to be in favour of the former.⁽²⁾ He refers to the opinion of Bhāruchi, namely, "bride-price is denoted by the word śulka and that obtains only in the āsura and the other forms of marriage." Pratāpa Rudra refutes a possible objection based on this statement by saying : "Here the question whether it is prohibited or not is not relevant, but the question whether it is partible or not is."⁽³⁾ He explains the word 'gains' (lābha) in Devala's enumeration as interest which accrues upon the capital consisting of previous strīdhana.⁽⁴⁾ It is also noteworthy that the author, like Vijñāneśvara, does not at all refer to the two verses of Kātyāyana about conditional gifts etc. This confirms the fact that this treatise substantially follows the Mitākṣarā as regards the interpretation of the term strīdhana.

It may, therefore, be concluded that according to authorities of the Southern school all property which belongs to a woman is her strīdhana with the exception that property given to a woman by strangers and property acquired by a woman by her own skill or exertions is not her strīdhana and that she has no kind of proprietary interest in such property. Presumably such property becomes the property of her husband.

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- (1) Sa.Vi.379, translation Setlur p.149. See also Sa.Vi.386-87 where Pratāpa Rudra cites the opinions of Bhāruchi, Aparārka, Someśvara, Vijñāneśvara etc. and concludes that the word 'dāya' (inheritance) includes also strīdhana.
- (2) Sa.Vi.379.
- (3) Sa.Vi.380, translation Setlur p.150.
- (4) Sa.Vi.381. An etymological definition of 'lābha' is given. For various interpretations see supra p. 67 note 1.

In the Mithila school the *Kṛityakalpataru* of *Lakṣmīdhara* may be considered as being the oldest authority. *Lakṣmīdhara* quotes the enumeration given by *Manu*, *Kātyāyana*, *Nārada*, *Viṣṇu*, and *Devala* and refers to the definitions given by *Kātyāyana*.⁽¹⁾ As regards *śulka* he seems to adopt the definition given by *Kātyāyana*.⁽²⁾ For *saudāyika* he accepts the second reading limiting that kind to the property received from the families of the parents of a woman.⁽³⁾ He does not refer to the first verse of *Yājñavalkya* containing the word 'ādyam'⁽⁴⁾ though he refers to the second verse only for the purpose of setting out the line succession to *strīdhana*.⁽⁵⁾ He cites the text of *Kātyāyana* about properties gained by art or labour etc. which do not form *strīdhana*.⁽⁶⁾ He does not make any comment on many of the quotations and so it is difficult to gather his exact opinion though it may be inferred with some confidence that *Lakṣmīdhara* did not contemplate extending the list of *strīdhana* properties to properties acquired by inheritance etc.

The *Vivādaratnākara* of *Chandēśvara* is chronologically the next authority in the Mithila school. He professes to add something

(1) Kal. 693-94.

(2) Ibid 695. See also Vi.Chi.139. For *Kātyāyana*'s verse see supra p.70. But the *Dāyabhāga* explanation appears to have been adopted in Vi.Ra.525 and the *Mitākṣarā* explanation in Vi.Chi.141. But in the latter there appears to be an attempt to blend the definitions given by *Kātyāyana* and *Vijñāneśvara*.

(3) Kal.684; also Vi.Ra.510. But in Vi.Chi.139 and in another ms. of Vi.Ra. (see Vi.Ra.510 footnote) the other reading has been accepted.

(4) Yaj. 2.143.

(5) Kal. 691.

(6) Where no comment is offered on this text it may be inferred, that in accordance with the apparent and unambiguous meaning of the text, the author does not want to treat these properties as *strīdhana*.

to the general law as stated in the Kalpataru, Pārijāta, Halāyudha's Nibandha and Madanaratnaprakāśa.⁽¹⁾ He seems to have followed the general tenor of the law as stated in the Kalpataru. However, he adds that the number six is only a denial of the less, the reason being that Yājñavalkya has also quoted some additional categories like gifts on supersession.⁽²⁾ He then quotes Yājñavalkya's enumeration without offering any comments. He also accepts the opinion of Medhātithi that gifts on the bridal procession should include gifts given also at the time when the bride is taken from the house of her husband to the house of her parents.⁽³⁾ His reading of the enumeration given by Viṣṇu brings into the term strīdhana also the property given by friends though he does not expressly say so.⁽⁴⁾ As regards Kātyāyana's text about property acquired by skill or labour etc. he remarks : "The meaning is that the husband alone has dominion over the strīdhana which has been acquired by a woman besides the categories already spoken of."⁽⁵⁾ This remark as coupled with his reading of the Viṣṇusūtra may lead one to the conclusion that according

(1) Vi.Ra. epilogue p.670.

(2) Vi.Ra.523; see also Ma.Ra.375, Smr.Cha.652 and Vi.Chi.138 for a similar remark.

(3) Vi.Ra.522-23. This appears to be a prelude to the Dvirāgamana for which see supra p. 69 and infra pp. 485. For the same reference to Medhātithi's comment see also the Prithvīchandrodaya ms.f.248(a). From this remark of the author it seems that the parts of the valuable commentary of Medhātithi which appear to have been lost to us were available to the early commentators like Chanḍeśvara, Vāchaspati Miśra, Raghunandana etc. - see infra pp. 103, 114.

(4) Vi.Ra.523 reads 'suhrid' for 'suta' in Vis.Smr.17.18 supra p. 63.

(5) Besides Raghurāma Śiromaṇi (see infra p. 115), Chanḍeśvara appears to be the only author to refer expressly to such property as being strīdhana.

to Chanḍeśvara these kinds of property are strīdhana. Like Lakṣmīdhara, however, he does not appear to be in favour of extending the import of the strīdhana as it has been done by the authors of the Benares and the Southern school.

The Vivādashintāmaṇi of Vāchaspati Miśra is a later but the most important authority of the Mithila school. Vāchaspati first quotes the enumeration of Manu and Kātyāyana, remarks that the number six is only a denial of the less and to substantiate his remark he refers to gift on supersession as 'the seventh' variety.⁽¹⁾ He then mentions the enumeration given by Viṣṇu and states Kātyāyana's definitions of śulka and gifts given after the marriage.⁽²⁾ He further remarks : "The categories of strīdhana are formed in this way. These alone are the saudāyika (strīdhana) of a woman."⁽³⁾ He then accepts the first reading of Kātyāyana's verse including in saydāyika property received from the families both of the husband and father,⁽⁴⁾ and remarks that money given for maintenance etc. which he describes further is also included in the same category.⁽⁵⁾ As regards ornaments he quotes and accepts the opinion of Medhātithi that ornaments which are worn by a woman with the consent of her husband become her property although they are not given to her by him.⁽⁶⁾ It therefore appears that according to this author the mere permissive use of

(1) Vi.Chi. 138.

(2) Vi.Chi. 138-39.

(3) Vi.Chi. 139.

(4) Ibid. The word 'brother' in the first version is held by the author to be only symbolical as to represent the parents, the husband etc. This reconciles the two readings.

(5) Vi.Chi. 139, (for maintenance see Devala quoted in Vi.Chi.141.)

(6) Vi.Chi.139. 'Given' appears to mean 'given absolutely'. The same reference is given by Raghunandana infra p.114.

husband's property by the wife changes, in some cases, also the ownership of the property.

Vāchaspati then independently refers to the woman's right of disposing of the property gifted to her by her husband and holds that she has an absolute power of disposal only over gifted moveables but not over immoveables and applies the same conclusion incidentally to property inherited from the husband.⁽¹⁾ The whole discussion is parenthetical and not very clear; hence it is difficult to state whether he includes within the word *strīdhana* any kind of property inherited by a woman from her husband.⁽²⁾ He, however, suggests that this whole discussion or at least the part of it which deals with inheritance does not pertain to *strīdhana*.⁽³⁾ He then gives the enumeration given by Devala and explains Śuṅka as "That which has been given to the girl out of a desire to marry (her)."⁽⁴⁾ He then concludes : "All this is *strīdhana*." From his confusing discussions it appears that Vāchaspati Miśra was himself not very clear about the import of the term *strīdhana*; but it seems that he also did not think of accepting the *Mitākṣarā* interpretation of the word '*ādya*'.

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- (1) Vi.Chi.140-1. Vāchaspati Miśra includes in the word '*bhartrīd-aya*' found in Kātyāyana's verse (see infra p.122) all property which a woman gets from her husband whether by inheritance or by gift *inter vivos*. - Vi.Chi.140.
- (2) However, one thing is clear, namely, that moveable property acquired howsoever by a woman from her husband is her absolute property according to Vāchaspati.
- (3) See the remark '*prakṛite tu Devalaḥ*' following the discussion on inheritance - Vi.Chi.141.
- (4) Vi.Chi. 141.

This general trend of the Mithila school is also to be found in the Vivādashandira of Misaru Miśra. He says that the number six is a denial of the less but not a restriction upon more categories for some additional categories have already been spoken of by Yājñavalkya.⁽¹⁾ However, by this remark he does not intend to extend the import of the word strīdhana so as to include property acquired by inheritance etc. as has been done by the authors of the Benares and the Southern schools; for, in the first place, he does not read the word 'ādya' in Yājñavalkya's enumeration which shows that he did not want to extend the list of categories of strīdhana beyond those which have already been mentioned in the smṛitis. Moreover, like the authors of the Bengal school, he treats property acquired by a woman by her own skill and gifts given by strangers as being not strīdhana. He goes even a step further and says that such property belongs to the husband alone and is inherited (vibhajanīyam) by sons alone.⁽²⁾ He makes one more complicated remark which appears to be in furtherance of this position : "Strīdhana denotes only that (property) which has been specifically mentioned (in the śāstra) (pāribhāṣikam lit. that which is technically defined), and not all (property of a woman); for, nomenclature (samjñā) and technical

(1) Vi.Cha.76. This shows that the interpretation put upon the word 'ṣaḍvidha' is only for the purpose of incorporating also the categories which have been mentioned by other sages but not by Manu. The reasoning is very similar to that of Nīlakanṭha - see supra pp. 90-91.

(2) Vi.Cha.77. For a similar provision in the Dāyabhāgārthadīpikā see infra p. 115. For the remark of Misaru Miśra on this point, however, it appears that women used to do business also (vāṇijya). It is no wonder, therefore, that Pratāpa Rudra and Nīlakanṭha include such profits in the word 'lābha' - see supra p. 67

definition (paribhāṣā) are used for some particular purpose (kārya-kāla), otherwise, although accompanied by the defining injunctions of the Śāstra they would, in every sphere, be left without any distinctive meaning (aviśeṣa) and consequentially would be useless."⁽¹⁾ The translation has been kept nearest to the original and needs some clarification. What Misaru Miśra means to say is when the nomenclature 'strīdhana' which has been used in the Dharmaśāstra has been explained by many enumerative texts it would be improper to attribute to the word its ordinary and etymological meaning; for, in that case the enumeration in the śāstra becomes purposeless as it is already included in the ordinary and the etymological meaning of the word. This is the only possible meaning one can make out of this apparently unintelligible remark. On the whole, however, it is certain that Misaru Miśra is very near to the position taken by the authors of the Bengal school and is nearest to Nīlakaṇṭha.

The Vivādasārārṇava of Sarvoru Śarman may also be considered as being an authority of the Mithila school. Like Vāchaspati Miśra Sarvoru Śarman also treats property inherited by a woman from her husband and property acquired by a woman from her husband by gift inter vivos to be on a par.⁽²⁾ But it has already been stated that he expressly includes in the word 'ādya' property inherited by a woman.⁽³⁾ He also reproduces almost exactly the above-mentioned

(1) "Strīdhanam cha pāribhāṣikameva na sarvaṃ, kāryakāla eva saṃjñāparibhāṣayorupayogāt anyathā vaiyarthyaṭ vinigamanāviraheṇa sarvatra tayloraviśeṣāt" - Vi.ChQ.76.

(2) Vi.Sam.ms.f.68(a).

(3) Ibid f.67(b), supra p.104.

remark of Misaru Miśra but does not care to explain it.⁽¹⁾ From the context, however, it appears that according to him this remark would mean that only technical strīdhana would devolve as strīdhana. In this respect he seems to be very close to Raghurāma Śiromaṇi who treats some categories of property as non-technical strīdhana but provides that they devolve on the heirs of the husband, which really means that they are not strīdhana at all.⁽²⁾ Therefore, on the whole it may be concluded that according to the Mithila school strīdhana consists only of categories which are mentioned in the smṛitis.

In the Bengal school the Dāyabhāga of Jīmūtavāhana is considered to be of paramount authority. Jīmūtavāhana begins with the enumeration given by Viṣṇu,⁽³⁾ quotes the definition of post-nuptial gifts (anvādheya) given by Kātyāyana and explains it.⁽⁴⁾ Gifts from the families both of the husband and of the parents are included in post-nuptial gifts. Thus the definitions of Manu and Kātyāyana and of Nārada are quoted.⁽⁵⁾ As regards the definition of adhyāvāhanika i.e. gift on the bridal procession, the second reading of Kātyāyana's verse is accepted which restricts the meaning of the word to gifts received only from the families of the father or the mother of a

(1) Ibid f.70(b).

(2) Infra pp. 115.

(3) Da.Bha. 4.1.1.

(4) Ibid 4.1.2-3. According to Jīmūta the word bāndhu (relative) denotes parents in Kātyāyana's definition whereas it denotes the maternal uncle etc. in Viṣṇu's enumeration. Śrīnātha, Śrīkṛṣṇa and Śrīkṛṣṇakānta commenting on the above passage, however, add that a gift from a son cannot be included into post-nuptial gifts as the son is directly related to the woman and not through her husband. See also Da.Bha.Di.verse 70 to the same effect. The reasoning is not very clear.

(5) Da.Bha. 4.1.4.

woman.⁽¹⁾ About the words 'inheritance from the husband' (bhartri-dāya) Jīmūta explains : Manu has not mentioned 'inheritance from the husband' but has said 'gifts from the husband',⁽²⁾ and Nārada does not mention 'gifts from the husband' but says 'inheritance from the husband';⁽³⁾ consequentially the words 'inheritance from the husband' denote only 'property given by the husband'. The explanation does not appear to be convincing as the reverse conclusion can also be arrived at with this fallacious logic. He also cites a text of Kātyāyana containing the word 'inheritance from the husband' which, in his opinion, are used in the sense of 'gift from the husband.'⁽⁴⁾

After having quoted the enumerations given by Yājñavalkya and Devala, Jīmūta quotes Vyāsa's text about nuptial gifts to the bridegroom becoming the strīdhana of the bride and remarks that the property must be given with an intention that it should belong to the daughter and that in the absence of such an intention it will not become the property of the daughter.⁽⁵⁾ He also comments that the words 'at the time of the marriage' have been used in this text only illustratively and quotes a text of the logicians to elucidate his point.⁽⁶⁾

(1) Ibid 4.1.5. See supra pp. 68-69 for the reading.

(2) Manu p.194-95 supra pp. 61.

(3) Supra p. 63.

(4) For the text see infra p. 118.

(5) Da.Bha.4.1.17. For the text see supra p. 85.

(6) The text which is quoted by Kamalākara as being of Devala is given by Jīmūta as being a text of the logicians. It is obvious that Kamalākara has followed the provisions of the Dāyabhāga in this respect which shows that at least on some occasions authors of one of the schools used to follow the agreeable provisions of the treatises of the other schools. For another instance of Kamalākara following the provisions of the Dāyabhāga see infra p. 348. For instances of the authors of one school following the author of another school see infra pp. 345, 383, 408.

Jīmūta then makes the following comment which forms the crux of the stand of the Bengal school as regards the import of the term strīdhana : "Thus as the enumeration of strīdhana has been made without any precise number (of categories), the number six is not specifically meant; but the texts of the (different) sages are intended simply to enumerate (the kinds of) strīdhana. That alone is strīdhana which a woman can give, sell or utilise independently of her husband's control."⁽¹⁾ The definition is peculiar to the Bengal school and has been accepted also in the Dāyatatva and the Dāyakram-asaṅgraha.⁽²⁾

Jīmūta then cites the verse of Kātyāyana about property acquired by a woman by labour etc. and remarks : "Over these properties the husband has dominion i.e. independance, and the husband has a right (lit. deserves) to take them even in the absence of distress. Therefore, the wealth which belongs to a woman (in this way) is not strīdhana on account of the absence of independant control (of the woman). Property besides that of these two kinds, however, belongs to the woman only wherein she has a right to give or sell etc."⁽³⁾ To elucidate his point further he then quotes the definition of saudāyika given by Kātyāyana and explains the word etymologically.⁽⁴⁾

According to all authors of the Bengal school, namely Jīmūta, Śrīkṛṣṇa, Śrīkara, Vāreśvara, Vidyāratna Smārtabhaṭṭāchārya, Nārāyaṇa, Gaṇeśabhaṭṭa, Raghunātha Sārvabhauma etc. this verse of

(1) Da.Bha. 4.1.18.

(2) Da.Ta. 24; Da.Kra.Sam. 17-18.

(3) Da.Bha. 4.1.20-21. See also Da.Ta.24 and Da.Kra.Sam.18.

(4) Da.Bha. 4.1.23.

Kātyāyana about property acquired by skill or labour and gifts from strangers forms as it were the gist of all descriptions and enumerations of strīdhana.⁽¹⁾ Therefore the two categories of property deserve special attention. Achyuta and Śrīkṛiṣṇa in their commentaries on the above-mentioned passage⁽²⁾ in the Dāyabhāga and Raghunandana in his Dāyatattva⁽³⁾ admit that a woman has svatva or ownership in such property. Śrīkṛiṣṇa in his Dāyakramasaṅgraha uses the word 'strīsvāmika' to show that a woman has ownership in such property.⁽⁴⁾ In his commentary on the Dāyabhāga,⁽⁵⁾ however, he adds that by mere desire the husband is able to put an end to the ownership of a woman and to create his ownership in the property coming under these two categories. It seems that he wants to distinguish these two categories from the categories of strīdhana which the husband can take and **put** an end to the ownership of the woman in them only in the case of calamity etc.⁽⁶⁾

As regards Śulka Jīmūta accepts the definitions both of Kātyāyana and Vyāsa and remarks : "What is given to a woman by artists constructing a house or executing some other work, as bribe to send her husband or other person to labour on such particular work, is her fee. It is the remuneration since its purpose is to employ."⁽⁷⁾ He specifically repudiates the interpretation of Śulka

(1) Da.Bha.4.1.18; Da.Kra.Sam.17; Da.Bha.Nir.ms.f. 4 (a & b); Vi.Se.ms.f.31(a)32(b); Smr.Sa.Vya.ms.f.42(a); Vya.Sa.Sam.ms.f.32(a & b); Da.Bya.Sam.ms.f.1.(b); Smr.Sa.Vya.(Raghunātha) ms.f.56(a).

(2) Da.Bha.4.1.20-21.

(3) Da.Ta.24, see infra.

(4) Da.Kra.Sam.18 infra p.114.

(5) Da.Bha.4.1.20-21.

(6) See infra next chapter.

(7) Da.Bha. 4.3.20.

as being a gratuity given in the case of marriages in the ^Āśura and other forms because if that were the meaning, in the Rākṣaṣa and other forms there would be no possibility of śulka at all.⁽¹⁾

Achyuta and Śrīkṛiṣṇa implicitly admit that śulka and lābha do not form saudāyika but state that the woman has independant right of disposal over them as they do not come under the two categories mentioned by Kātyāyana, viz. property acquired by a woman by her own skill and gifts from strangers.⁽²⁾ It is impossible to see why these two categories, namely, śulka and lābha cannot be saudāyika according to these commentators unless they treat them as being given by strangers a suggestion which Śrīkṛiṣṇa specifically refutes.

Not only does Jūmūtavāhana restrict the enumeration of strīdhana by accepting the second reading of Yājñavalkya's text but he also specifically states that wealth inherited by a woman from her husband, father, son or other relatives is not strīdhana and does not devolve upon her strīdhana heirs.⁽³⁾ On this point he has been expressly followed by Śrīkṛiṣṇa, Śrīkara, Anantarāma and Raghurāma Śiromaṇi.⁽⁴⁾

Thus according to Jīmūta the test of strīdhana is its quality of being freely alienable. But we do not know which property is freely alienable by a woman and so Banerjee rightly remarks :

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- (1) Da.Bha.4.3.22-23. The term 'Āsurādi' denotes the four unapproved forms of marriage - see introduction pp.40-41.
 (2) Their commentaries on Da.Bha. 4.1.23
 (3) See Da.Bha. 11.1.57-58 (inheritance from the husband), 11.1.65 (inheritance from the father), 11.2.30-32 (prescribing limited estate for all female heirs).
 (4) Da.Kra.Sam.4,21 ; Vi.Chandrikā ms.f.41(b); Da.Bha.Ni.ms. f.4(b); Da.Bha.Di. verse 109.

" ... The foregoing definition is open to the objection that it defines one unknown thing in terms of another."⁽¹⁾ Really speaking according to this theory only *saudāyika* can be *strīdhana*. But in that case *Kātyāyana* would have expressly mentioned that *saudāyika* itself only is *strīdhana*. It has been observed that *Achyuta* and *Śrīkṛṣṇa* implicitly include in the term *strīdhana* property which is not *saudāyika*.⁽²⁾ Moreover it will be shown later on that a distinction has been made throughout between the alienability of the two kinds of *strīdhana*, namely, *saudāyika* and non-*saudāyika*.⁽³⁾ It must also be remembered that although *Jīmūta* says that the property coming under the categories of *strīdhana* belongs to the woman only,⁽⁴⁾ her interest therein is not absolute in the fullest sense of the term; for in case of calamity etc. the husband can take and utilise his wife's *strīdhana* and put an end to her ownership in it.⁽⁵⁾ As he admits that a woman has ownership in property acquired by a woman by her own skill and gifts from strangers it appears that, notwithstanding the fact that such property is not *strīdhana*, if the woman alienates such property the alienation will be valid according to the doctrine of *factum valet*.⁽⁶⁾ If this is so it must be said that according to the Bengal school the line which divides a woman's *strīdhana* from the rest of her property is a very thin one.

Another patent defect in the provisions of the *Dāyābhaga*

(1) Banerjee pp. 339-40.

(2) Supra p. III.

(3) Infra next chapter.

(4) Supra P. 109.

(5) Infra next chapter.

(6) Infra p. 117.

is the interpretation put upon the definition of śulka as given by Kātyāyana. The explanation conveys an idea that the bribe etc. as stated therein proceeds from the strangers. But in that case it ceases to be strīdhana according to the verse of Kātyāyana which Jīmūta accepts and relies upon. Thus Jīmūta is self-contradictory as he accepts śulka as one of the categories of strīdhana but explains it in a way by which it falls outside of the scope of strīdhana. It has been shown that his commentators have made an unsuccessful attempt to wriggle out of this dilemma.

The Dāyatattva of Raghunandana is considered to be the next most important authority in the Bengal school. The provisions in the Dāyatattva are similar to those in the Dāyabhāga. However, the comment on the verse of Kātyāyana about property acquired by labour etc. is slightly different. Raghunandana says : "On account of the right to give away etc. the woman alone has ownership in the property besides the property of these two kinds."⁽¹⁾ Thus whereas Jīmūtavāhana divides woman's property into 'property which belongs to a woman' (striyā dhanam) and 'property which belongs to a woman alone' (striyā eva dhanam) i.e. strīdhana, Raghunandana sets out the distinction between the two categories as 'property which belongs to a woman' (striyā dhanam) and 'that in which woman alone has property' (striyā eva svatvam). The only difference between Jīmūta and Raghunandana is that the former uses the word property in its concrete

(1) Da.Ta.24. It is notable that Raghunandana begins his discussion about strīdhana with the verse of Kātyāyana about property acquired by labour etc. which shows the growing importance of this text in the Bengal school.

sense whereas the latter uses the word in its abstract sense. In technical terms it may be said ^{that} the two divisions represent property in which a woman has merely svatva and property in which a woman has both svatva and svātantrya or svāmya.

The only other independant contribution of Raghunandana is that he quotes the opinion of Medhātithi about ornaments given by the husband and accepts it. ⁽¹⁾ The provision is the same as has been cited by Vāchaspati Miśra. ⁽²⁾

The Dāyakramasaṅgraha of Śrīkṛṣṇa is also not very different from the Dāyabhaga. On Kātyāyana's verse Śrīkṛṣṇa comments : "Thus although both these kinds of property are those in which a woman has ownership, they do not form an object of her independant dealing. Similarly, the woman requires the consent of the husband in disposing of such property..." ⁽³⁾ He, therefore, confirms the definition of strīdhana as given in the Dāyabhāga.

As regards the term 'inheritance from the husband' (bhartrīdāya) occurring in the enumeration given by Nārada he says that it does not denote property acquired by inheritance, as the term has been used in the chapter dealing with strīdhana and as the root 'dā' in the word 'dāya' would, in that case, acquire only a secondary meaning. ⁽⁴⁾

(1) Da.Ta. 24.

(2) Supra pp. 103.

(3) Da.Kra.Sam. 18.

(4) Da.Kra.Sam. 15-18. This explanation widens the scope of limited estate to cover even strīdhana of a female which has been inherited by another female. For an application of the general principle, namely, inherited property is not strīdhana see Da.Kra.Sam. pp. 4 and 18.

Specific reference must be made to two authors of the Bengal school who diverge from the general line adopted by the authors of the same school. Raghurāma Śiromaṇi, the author of the metrical treatise called the *Dāyabhāgārthadīpikā* is one of them. According to him the two categories mentioned by *Kātyāyana*, namely, property acquired by labour and gifts from strangers together with the third category, namely, immoveable property given by the husband, constitute the non-technical (*apāribhāṣika*) *strīdhana* of a woman.⁽¹⁾ But he says that the husband being the owner (*prabhu* lit. the master) of such property⁽²⁾ it devolves like male's property upon the heirs of the husband.⁽³⁾ In the same breath he also says that excluding these three categories the other property of a woman is her *strīdhana*.⁽⁴⁾ From this remark, coupled with the line of succession which he prescribes for such property, there can be no doubt that according to Raghurāma the so-called '*apāribhāṣika strīdhana*' is not *strīdhana* at all. It may be remembered that Śrīkṛṣṇa calls such property '*strīsvāmika*'⁽⁵⁾ and *Nīlakaṇṭha* describes the so-called '*apāribhāṣika strīdhana*' as being simply '*mātrīdhana*' or '*matṛisvāmikadhana-mātra*'.⁽⁶⁾ On the whole it seems that the stand adopted by

(1) *Bharṭṛidattasthāvare tu na dānādyam striyā matam / Bharṭṛidattasthāvaram na strīdhanam pāribhāṣikam // Uktānyadatte śilpāpte sthāvare bharṭṛidattake / Patyuh prabhutvam vijñeyam śeṣam tu strīdhanam smṛitam // Apāribhāṣikeṣveṣu cha strīdhaneṣu triṣu cha / Pumsām dhanoktarītyā tu pare jñeyo'dhikārabhāk //* - Verses 52-54 in *Da.Bha.Di.* ('jñeyā' ought to be substituted for 'jñeyo' in the last line.)

(2) *Da.Bha.Di.* verse 53 supra and verse 55 infra.

(3) "*Pātyuh prabhutayā patyurdāyādā adhikāriṇaḥ / ...Da.Bha.Di.55.*

(4) *Ibid* verse 53 supra.

(5) Supra p. 110.

(6) Supra p. 94.

Raghurāma is very similar to the one taken by Nīlakaṇṭha, namely, woman's property consists of two kinds : her technical property i.e. strīdhana, and her other property in which she has ownership only. However, there is one subtle difference between Nīlakaṇṭha and Raghurāma as regards the categories which constitute a woman's non-technical property. According to Nīlakaṇṭha the two terms, namely, technical property and non-technical property denote strīdhana which has been spoken of in the smṛitis and property which is acquired by inheritance, purchase, partition etc. i.e. property which has been included by Vījñāneśvara in the word 'ādya'. Nīlakaṇṭha considers that property mentioned in Kātyāyana's text, namely, property acquired by labour and gifts from strangers is not woman's property at all. According to Raghurāma non-technical strīdhana means only property which comes under these last two categories; for according to him property acquired by inheritance etc. does not appear in the picture at all when strīdhana is being discussed. So when the authors of the Bengal school comfortably divide woman's property into property which comes under the above-mentioned verse of Kātyāyana and woman's 'other' property, they mean to include only strīdhana in this latter category and not also property which a woman gets by inheritance, partition etc. which might otherwise be included in 'woman's other property'.

As according to the authors of the Bengal school a woman has some kind of ownership in property which she acquires by her own skill or labour and property gifted to her by strangers⁽¹⁾ the

(1) Supra pp. 103-10, 113-14.

question arises as to whether a woman is capable of making a valid disposition of such property notwithstanding the fact that such property is not strīdhana. The earlier authors of the school are not of any help on this point. But Vāchaspati Miśra, the author of the Smṛitisārasaṅgraha throws some light on this point. He divides strīdhana, quite sensibly, into two categories, namely, saudāyika, and strīdhana which is etymological (yauṅika) and which merely forms the object of the woman's ownership (strīsvatvāspadamātram).⁽¹⁾ The phraseology is very similar to that used by Nīlakaṇṭha. He further says that the husband has no dominion (prabhutā) over the former which is at the free disposal of the woman owner whereas the husband has dominion over the latter and that the husband's disagreement creates a bar for the woman in dealing with such property. However, he further adds that if a woman in fact enters into any transaction concerning such property the transaction in fact remains valid for the woman alone has ownership in such property.⁽²⁾ Thus it appears that this author is in favour of applying the doctrine of factum valet to such cases. He is by no means alone in adopting this stand and is supported by the author of the Dāyasarvasva who expresses his opinion in almost identical terms.⁽³⁾ It seems, therefore, that the intention of the later authors of the Bengal school was to bring the two categories mentioned in Kātyāyana's verse closer to strīdhana itself.

(1) Smr.Sa.Sam. ms.f.44(a).

(2) Smr.Sa.Sam. 44(a) : " ... Dvitiye cha bhartuḥ prabhutvaṃ tad-vimatau striyā vyavahāre pratyavāyaḥ vyavahārastu siddhatyeva svamātrasvatvāt tadubhaye adhikāraḥ kalpyate."

(3) The Dāyasarvasva I.O.L. microfilm no.366 f.8 : " ...Etattu bharturanumatim vinā vyavahāre striyā pratyavāyārthameva na tu tasyāḥ svatvanirāsāya ato vyavahāraḥ siddhatyeva."

In the light of these texts we may proceed to see how far the opinions of the leaders of the different schools have been accepted by the courts. Amongst the most important topics to be taken up in this connexion comes the controvertial question of inherited property. Before we can review the history of the case-law on this point we should digress momentarily to inspect the texts which are at the root of the doctrine of widow's estate or women's limited estate according to which a woman can own certain kinds of property only subject to certain restrictions on alienation and does not become a fresh stock of descent in respect of such property.

Vṛiddha Manu says : "The childness widow keeping unsullied the bed of her lord and preserving the vow (of chastity) shall alone offer him oblations and shall obtain his entire property."⁽¹⁾ In two verses Kātyāyana says : "The woman may spend the inheritance from her husband according to her pleasure after death; but if he is living she should preserve it or spend it for the sake of his family."⁽²⁾ "The childless widow, preserving unsullied the bed of her lord and abiding with her venerable preceptor shall enjoy with moderation the property until death. After her let the heirs take it."⁽³⁾ In a third text Kātyāyana says : "A chaste widow shall, after the death of her husband, obtain her husband's share; but throughout her life

(1) The verse is not found in the extant Manusmṛiti but it has been unanimously ascribed to Manu - cited in Mit. on Yaj.2.135 etc.

(2) Cited in Vi.Ta. 433 etc. See the appendix text No.73.

(3) Ibid at 389, 443 etc. See the appendix text No.74.

shall not have freedom (svāmya lit. dominion) to alienate such property by gift, mortgage or sale."⁽¹⁾ The doctrine derives its support from the second and third verses of Kātyāyana since they contain provisions concerning succession to and disposition of such property respectively. It may be stated at the outset that the second text of Kātyāyana has not been referred to by any of the commentators of the Yājñavalkyasmṛiti, namely, by Viśvarūpa, Vijñāneśvara or Aparārka. The only reputed authors who refer to the third text of Kātyāyana are Devaṇṇa, Madanasimha, Pratāpa Rudra, Nīlakaṇṭha, Mitra Miśra, Kamalākara and Bālabhaṭṭa; but Kamalākara declares this text to be unauthoritative on the basis that it has not been referred to by Aparārka, Madanasimha (?), or Mādhava.⁽²⁾

It need not be repeated here that the Bengal school clearly repudiates the idea of inherited property becoming strīdhana of the woman who inherits it and all the authors of that school appear to be unanimous on that point.

Coming to the Mitākṣarā school Vijñāneśvara refers to the text of Manu conferring entire estate on a widow but does not refer to any of the texts of Kātyāyana.⁽³⁾ Moreover at one place he gives a practical illustration of his stand that a share obtained in partition by a woman is her strīdhana.⁽⁴⁾ Therefore by parity of

(1) Ibid at 389 etc. See the appendix text No. 72.

(2) Vi.Ta.389. Bālabhaṭṭa declares the second text to be unauthoritative - Bal. on Yāj.

(3) Mit. on Yaj.2.135 (Nir.Edi.p.217.)

II.148.

(4) See infra pp. 160-61.

reasoning it may be concluded that he intends strictly to adhere to his definition of the word *strīdhana* which includes inherited property into the import of the term.

Mitra Miśra who refers to all the texts cited above enters into a long discussion in which he refutes all the points of the Bengal school⁽¹⁾ and on the basis of the principle that property of a person must devolve on the heirs of that person and not of any other persons he clearly repudiates the idea that on the death of a widow her husband's heirs and not her own heirs would take the property in which she had acquired ownership.⁽²⁾ In the end he suddenly changes his position and comes to the conclusion that only on account of the textual provision to that effect the husband's heirs and not widow's heirs should take the residue of the property inherited by her from her husband.⁽³⁾ But even then he rejects the stand taken by the Bengal school that the widow has only right of enjoyment in the property. Referring to the third text of *Kātyāyana* he says that the restriction mentioned in that verse operates only against gifts to actors, dancers etc. and that the widow has full freedom to dispose of such property for spiritual purposes.⁽⁴⁾ It may be mentioned that almost all the authors who refer to this third text of *Kātyāyana* put the same interpretation on the verse and stress the point that the restriction

(1) For a succinct statement about the position of the Bengal school see Vi.Mi.491.

(2) Vi.Mi.492.

(3) Ibid p.493.

(4) Ibid.

mentioned is of no avail against alienation for spiritual purposes.⁽¹⁾

However, the abrupt conclusion at which Mitra Miśra arrives is utterly incongruous with the preceding prolonged discussion and with his definition of the word strīdhana. Moreover in his commentary on the Yājñavalkyasmṛiti he specifically includes into strīdhana the property which a woman inherits from her husband.⁽²⁾ As he is not unequivocal on this point the opinion of Vijñāneśvara must be followed in ascertaining the law of the Benares school.⁽³⁾

Nīlakaṇṭha does not refer to the second text of Kātyāyana but refers to his third text which, according to Nīlakaṇṭha, puts restrictions only on gifts to actors, dancers etc.⁽⁴⁾ But even here he does not specifically say that inherited property is strīdhana and therefore, in conformity with the other passages in the Mayūkha, it may be confirmed that according to this commentator inherited property is not strīdhana.⁽⁵⁾

Coming to the authorities of the Southern school we find that the second verse of Kātyāyana is applied to joint family property in the Smṛitichandrikā⁽⁶⁾ and, at one place, in the Sarasvatīvilāsa.⁽⁷⁾ Mādhava utilises this verse to prohibit

(1) Smr.Cha.677, Ma.Ra.361, Vya.Ma.138 etc.

(2) Supra p.84.

(3) For this principle see Jagannath v. Ranjit (1897) 25 Cal.354.

(4) Vya.Ma.138.

(5) Supra pp.88-96.

(6) Smr.Cha.677.

(7) Sa.Vi.410. But at p.412 the author repudiates the possibility of the inherited property of a widow being succeeded to by her father etc. in the absence of her daughter, or daughter's son.

niyoga.⁽¹⁾ Moreover inherited property has expressly been included in strīdhana by Mādhava and Pratāpa Rudra.⁽²⁾

According to Chanḍeśvara and Vāchaspati Miśra the first two texts of Kātyāyana confer upon a woman absolute right in movables and restricted right in immovables which she acquires from her husband by way of gift or inheritance.⁽³⁾ Although the question whether particular property is strīdhana or not is not based upon the question of whether a woman can freely dispose of such property or not it ought to be submitted that property which a woman ^{can} freely dispose of can hardly be treated as anything else than her strīdhana. On this basis it may be suggested that movable property which a woman inherits from her husband should be considered as strīdhana according to the law of the Mithila school.

As the reports of the cases decided in the Calcutta Courts were the first to be published the earliest cases on strīdhana also come from Bengal. Before examining the case-law in detail, it may be noted that some of the earlier decisions of the Courts were based upon the opinion of the pandits who were specially appointed by the courts in those days for advice on matters concerning Hindu law. Therefore an incorrect opinion of a pandit in a single earlier case could set the whole subsequent law on a wrong footing as regards the point decided in that particular case.

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- (1) Pa.Ma.358. This is an appropriate interpretation. For niyoga see *supra* pp.43-44.
 (2) See *supra* p.81.
 (3) Vi.Ra.511-12; Vi.Chi.140-41.

Before turning to the case-law on this point it is necessary to note the opinions of Sir William Macnaughten and Sir Thomas Strange who have frequently been referred to as authorities in the earlier decisions. Macnaughten says : "In the Mitácshará, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her peculium. And it may be here observed, that stridhun which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance ...".⁽¹⁾ From the further discussion it seems that Macnaughten uses the words strīdhana and peculium as synonyms. It is not easy to guess what he means by the words 'woman's property' but the distinction which he makes between 'woman's property' and peculium is obviously without any authority. However, this baseless statement of Macnaughten has served as a foundation for the development of the doctrine that even according to the Mitākṣarā school inherited property is not strīdhana.⁽²⁾

(1) Macnaughten's Hindu law (1829) Vol.I.38.

(2) Goburdhan v. Onoop (1865) 3 W.R.105; Sengamalathammal v. Velayanda (1867) 3 M.H.C.R.312; Thakore Deyhee v. Rai Baluk Ram (1866) 11 M.I.A.139; Bhaugwandeem v. Myna Bae (1868) 12 M.I.A.397; Dowlut Kunear v. Burma Deo (1874) 14 B.L.R.246; Chotay Lall v. Chunnoo Lall (1878) 6 I.A.15; Phukar Singh v. Ranjit Singh (1878) 1 All.661; Huridayal v. Grish Chunder (1890) 17 Cal.901; Sheo Shankar v. Debi Sahai (1903) 30 I.A. 202 infra.

On the other hand, Strange states : "But according to the Mitacshara, and its followers, property which the widow may have acquired by inheritance, is transmissible to her own heirs, classing with this school as part of her stridhana;".⁽¹⁾ His son also supports him on this point.⁽²⁾ It will be seen, however, that throughout the development of the case-law the opinion of Strange has never been relied upon by the Courts although it is supported by the textual authorities of the Mitākṣarā school.

The earliest case on the question whether inherited property is strīdhana, is Frankishen v. Mt. Bhagwutee.⁽³⁾ Although the point was not under direct consideration of the Court the opinion of the Pandit as well as the obiter dictum of the Court suggested that strīdhana of a mother which has been inherited by her daughter does not become strīdhana of the latter and does not devolve upon her heirs. No reason is given in the text of the report but it may be inferred that the pandit of the court depended, in all probability, upon the authorities of the Bengal school.

In Mt. Runnoo v. Jeo Rane⁽⁴⁾ the property which a daughter inherited, together with her sister, from her mother was held to have been inherited, on the demise of such daughter, by her sister 'as the heir at law' in preference to the widow of the paramour of the mother. It is not possible to guess the nature of the claim the latter could make on the suit-property and it is

(1) Strange (1830 edi.) vol.I.248. See also Vol.I.31.

(2) Thomas Lumisden Strange : A Manual of Hindu Law (1863 2nd edi.) pp.34-35.

(3) (1793) Mac.Rep. Vol.I.3.

(4) (1795) Mac.Rep. Vol.I.8.

also not clear whether the sister was declared to be entitled to such property as a sister or as daughter to her mother. The case is thus of little direct authority.

In Mahoda v. Kuleani,⁽¹⁾ wherein Colebrooke presided over the Court, it was held that a gift of the whole of the property inherited from the husband is invalid even if the widow executes it in favour of the nearest reversioner. The case, however, did not decide as to what is the limit upto which a widow can dispose of property inherited from the husband. In Bijya v. Unpoorna⁽²⁾ the same conclusion as regards the limited estate of a woman in inherited property was confirmed and extended to the inheritance taken by ^{the} a mother from her son. It is to be noted that according to the pandits in the three courts in the adjacent districts and the decisions of the District Court and the Provincial Court in this case the gift, being given for charitable purpose, was valid.

However, in accordance with the vyavasthā of the pandits who cited the authority of the Dāyabhāga, the Dāyatatva, the Vivādabhaṅgārṇavaṇ and the Dāyarahasya it was decided in Ramchander v. Gangagovind⁽³⁾ that a widow can make a gift over of only three-sixteenths of her husband's property for the benefit of his soul.

In Cossinaut v. Hurrosoondry⁽⁴⁾ it was decided that under

(1) (1803) Mac.Rep.Vol.I.62.

(2) (1806) Mac.Rep.Vol.I.162. Colebrooke presided in this case also.

(3) (1826) Mac.Rep.Vol.IV.117.

(4) (1819) 2 Mor.Dig.198 reprinted in I.D.III.907.

the Dāyabhāga law "no distinction is taken between the realty and the personalty as to the quantum of the widow's estate, but the whole appears to be given to her absolutely for some purposes, though restricted in her disposition as to others; and therefore she takes more than a life-estate in the realty for those allowed purposes, and less than an absolute estate in the personalty for other and different purposes;" The Court distinguished as arising from the Mithila the 'Corformaha's case'⁽¹⁾ decided by that Court in November 1912 and followed in Juggomohunmey v. Ramhun (decided on 23-6-1814) and Jupada v. Juggernaut (decided on 7-2-1816), and held that the doctrine followed therein was not applicable to Bengal.⁽²⁾ The case seems to have undergone review, revision and appeals⁽³⁾ and finally came before their Lordships of the Privy Council as G. Bysack v. Cossinaut⁽⁴⁾ and their Lordships

(1) Referred to in 2 Mor.Dig.198 at 216

(2) Ibid at p.219. It was held that the authority of the Vivādar-atnākara and the Vivādachintāmaṇi, being in direct conflict with the Dāyabhāga on this point, was not applicable to Bengal. According to these Mithila cases it was decided that a widow has full right of disposal over moveable property inherited from the husband.

(3) See also G.V.K.(1794) 2 Mor.Dig.234 reprinted in I.D.Vol.III.934. which is one of the stages of the same case.

(4) (1826) Mor. by Montriou p.495 from which it is reprinted in I.D. Vol.L.303. It is to be noted that the Court pandits, after having referred to the distinction between property obtained in partition and by inheritance referred to the difference of opinion amongst the pandits as to whether the former should be treated as strīdhana and expressed that the better opinion was to regard the former as strīdhana, as share given in partition to a woman is rather in the nature of a gift. The decree of the Supreme Court against which the appeal was preferred to the P.C. was passed by Sir Francis Macnaghten. It is also to be noted that Raghurāma Śiromaṇi, the author of the Dāyabhāgārth-adīpikā, gave opinion in this case as an outside pandit.

of the P.C. confirmed the decision of the lower Court.

In Gyan v. Dookhurn Singh⁽¹⁾ it was declared that according to the law "as current both in Maithila and the West" the property which a daughter inherits from her father is not strīdhana and that she cannot dispose of such property by way of gift. The case was decided in accordance with the opinion of the pandits of the Court who seem to have relied upon the argument of Jīmūtavāhana to the effect that when a widow cannot dispose of property which she inherits from her husband a fortiori the daughter whose right is weaker than that of the widow cannot possess that right at all. It may merely be stated here that this is the first instance of superimposing the theory of the Bengal school upon the Mitākṣarā school.

In Goburdhan v. Onoop⁽²⁾ it was decided that immoveable property which a widow inherits from the husband is not her 'peculium' according to the Mitākṣarā. Their Lordships of the Calcutta High Court relied upon the statements of Macnaughten and Strange⁽³⁾ and quoted for support a passage in the Mitākṣarā which

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- (1) (1829) Mac.Rep.Vol.4.330. See also Sheo Sahai v. Mt.Omed Kunwur (1840) Mac.Rep.Vol.6.301. and Heera Lal v. Dhuncoomarry S.A.D.R.(1862) p.190.
- (2) (1865) 3 W.R.105.
- (3) (Macnaughten) Vol.I.38, Strange Vol.I.137,246 etc. were quoted. Their Lordships also cited two passages in the translation of the Vivādachintāmaṇi by Tagore according to which property which a widow from her husband is and is not her strīdhana respectively and made an unsatisfactory attempt to resolve the conflict between these passages.

which really does not exist in the text of the treatise.⁽¹⁾ Their Lordships further observed that "the extended doctrine of the Mitakshara which goes so much beyond Manu" had never been acted upon in any case and that had the law been otherwise the doctrine, namely, inherited property is strīdhana, would not have remained in 'abeyance' for such a long time. Their Lordships also remarked that the doctrine was never followed as law in Madras nor was it attempted to be urged before them on any previous occasion. From the foregoing discussion it would appear that none of the authorities which their Lordships resort to in support of their decision is correct. It is clear that this case is another instance of misleading extension of the law of the Eastern school to the law of the Mitākṣarā.

In Punchadand v. Lalshan⁽²⁾ which appears to be a Mithilā case it was decided that both according to the Mitākṣarā and the Vivādachintāmaṇi immoveable property which a mother inherits from her son is not her strīdhana. Their Lordships expressed the view that inherited property is nowhere laid down in the Mitākṣarā as

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- (1) 3 W.R.105 at 107. The alleged passage in the Mitākṣarā has been quoted from Strange (1830) Vol.II.253. The passage runs thus : "On failure of descendants down to the son's grandson, the wife inherits : and she, having received her husband's heritage, should take the protection of her husband's family or of her father's, and should use her husband's heritage for the support of life, and make donations and give alms in a moderate degree, for the benefit of her deceased husband; but not dispose of it at her pleasure like her own peculiar property." In Strange's work the passage has been quoted from H.T.Colebrooke : Two Treatises in the Hindu Law of Inheritance (1810) p.226 wherein it is quoted as an extract from the commentary of Śrīkrishṇa on the Dāyabhāga. The extract occurs in that portion of the book which contains the translation of the Dāyabhāga and not of the Mitākṣarā.
- (2) (1865) 3 W.R.140.

becoming strīdhana of the woman who inherits it.⁽¹⁾ Though the decision is correct as regards the law of the Mithila school the remark about the law of the Mitākṣarā is evidently baseless. But their Lordships further added : "If the law of the Mitakshara on this point was so different from that prevalent in Bengal, as it is contended, the commentators would have distinctly laid down the discrepancy. As a general rule, the laws may be considered to correspond although there are certain special points on which they differ."⁽²⁾

In Madras it appears that woman's limited estate was recognised by the Supreme Court as early as in 1813. In Ramasamy v. Vallatah⁽³⁾ the obiter dictum of the Court was that property which a mother inherits from her son devolves, ~~after~~ her death, not upon her own heirs but upon the heirs of her son. It is surprising, however, that only Colebrooke's Digest has been cited as an authority for this dictum.⁽⁴⁾

In Bachiraju v. Venkatappadu⁽⁵⁾ their Lordships of the Madras High Court followed the dictum. They further observed that the Mitākṣarā doctrine was not followed in any of the cases reported

(1) Tagor's translation of the Vivādachintāmaṇi, which was cited in Goburdhan's case was also cited in this case.

(2) (1865) 3 W.R.140 at 141. For a contrary remark of their Lordships of the Privy Council see Giridharilal's case *infra* p. 466.

(3) Strange's Notes of Cases Vol.II.211.

(4) Col.Dig.8 vo.edi.Vol.III p.505 was cited. It appears that Sir Thomas Strange himself gave this decision- See the reference to his name in Bachiraju v. Venkatappadu (1865) 2 M.H.C.R.402 at 406.

(5) (1865) 2 M.H.C.R.402.

in Morley's Digest and that in the Mitākṣarā itself "no illustration is given of the bare declaration that property acquired by inheritance also comes under the head of stridhanam."⁽¹⁾ It was also observed that Jagannātha in his chapter on woman's property makes 'no allusion whatever' to the doctrine.⁽²⁾ It must be stated that the cases reported in Morley's Digest come only from Bengal and that it is unlikely that the digest should contain any case in which the Mitākṣarā doctrine is expounded. It must also be noted that Vijñāneśvara does give a practical illustration of his broad definition which will be noted below.⁽³⁾ However, the whole trend of the reasoning of their Lordships is leaning heavily towards ^{the} law of the Bengal school.⁽⁴⁾ The decision cannot claim to derive any support from the Mitākṣarā itself or from any of the treatises of the Southern school.

In Sengamalathammal v. Valaynda⁽⁵⁾ the above case was followed and a broader proposition was established, namely, property

(1) Ibid at p.405.

(2) Ibid. Their Lordships, however, noted that Sir Thomas Strange in the first edition (1825) of his book at pp.165-66 mentions that property inherited by a mother from her son is her strīdhana according to the Southern school but further added that his particular passage has been 'accidentally' omitted in the edition of that work edited by Mayne in 1859 p.144. Their Lordships did not refer to the other passage in Strange's work which clearly states that property inherited by a widow etc. is her strīdhana according to the Mitākṣarā and its followers - *supra* p. 124.

(3) *Infra* pp.160-61.

(4) Dā.Bha.11.1.30,31,56,65 were referred to for limited estate.

(5) (1867) 3 M.H.C.R.312.

acquired by inheritance is not strīdhana. This was a case of a daughter succeeding to the strīdhana of her mother and, following the authority of the Dāyabhāga, the Dāyakramasaṅgraha and Sir William Macnaughten,⁽¹⁾ it was held that such property was not strīdhana in the hands of the daughter.

Their Lordships, however, referred to the passage in the Smṛitichandrikā where its author states that when a mother inherits property from her son she takes it for herself alone like her adhyagni etc.⁽²⁾ and merely observed that by this passage "no more is meant than that some property acquired by women by inheritance will follow the rule applicable to the descent of stridhanam though not falling under any of the descriptions of such property."⁽³⁾ Their Lordships did not elucidate their remark further and it seems that the passage did not affect their decision in any way.

The decisions of the Bombay Courts which are quite contrary to the above decisions will be noted below. In the meantime we shall consider the two important decisions of their Lordships of the Privy Council which have for their background the above-mentioned decisions and which form as it were the cornerstones of the distinction between widow's estate and strīdhana as known to modern Hindu law.

(1) Ibid. at 315.

(2) *Supra* pp. 97-98.

(3) 3 M.H.C.R.312 at 314.

The first case was Mt. Thakore Deyhee v. Rai Baluk Ram⁽¹⁾ wherein their Lordships of the Privy Council decided that according to the Mitākṣarā or the law of the Benares school the widow has no power to dispose of the immoveable property inherited from the husband and that such property does not constitute her peculium. Their Lordships appear to have rejected the opinion of Sir Thomas Strange that such property is strīdhana⁽²⁾ and to have approved the famous passage in Macnaghten's book.⁽³⁾ As regards the Mitākṣarā passage declaring widow's right to inherit her husband's property⁽⁴⁾ their Lordships remarked : "The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate."⁽⁵⁾ "It is certain that upon other subjects the Mitacshara cites with approbation Menu, Catyayana, Nareda, and others, upon whose dicta the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of Bengal."⁽⁶⁾

It is obvious that their Lordships had no opportunity to consider the texts of the Benares school which expressly include in strīdhana property inherited by a woman. It appears from their Lordships' remark that in those days even the translation of the

(1) (1866) 11 M.I.A.139.

(2) Ibid at pp.173-74. For the opinion of Strange see *supra* p.124.

(3) For this see *supra* p.123.

(4) Mit. on Yaj.2.135-36 Nir.Edi.p.221.

(5) 11 M.I.A.139 at 172.

(6) Ibid at 173.

whole of the Mitākṣarā was not available to them.⁽¹⁾ Under such circumstances it is not surprising that their Lordships gave a decision which, it must be stated, does not appear to be in consonance with the law laid down by the texts of the Benares school. It must also be remembered that the two texts of Kātyāyana which are the mainstay of the doctrine of limited estate⁽²⁾ have not been even referred to by many authors of the Mitākṣarā school and that Kamalākara and Bālabhaṭṭa declare these texts to be spurious (lit. unauthentic).⁽³⁾ Moreover the method of depending upon the verses of the ancient sages as against the express opinion of the commentators appears to be directly contrary to the principle which was so emphatically laid down afterwards by their Lordships themselves in Collector of Madura v. Mottoo Ramalinga,⁽⁴⁾ namely, the interpretation which a commentator puts upon an ancient text is more important than the text itself.

The next important case is Bhugwandeem v. Myna Baee⁽⁵⁾ wherein the principal question to be decided was whether according to the law of the Benares school a Hindu widow is competent to dispose by will or by deed of gift of either moveable or immoveable property inherited from her husband, to the prejudice of his next heirs.⁽⁶⁾ Their Lordships after considering all the facts and so

(1) Ibid. at 173.

(2) Supra pp. 118-19.

(3) Supra p. 119.

(4) (1868) 12 M.I.A.397 at 436. See supra p.31.

(5) (1867) 11 M.I.A.487.

(6) Ibid at 495.

much of the law as was placed before them decided that "according to the law of the Benares school, notwithstanding the ambiguous passage in the Mitacshara, no part of her husband's estate, whether moveable or immoveable, to which a Hindu widow succeeds by inheritance, forms part of her stridhun, or peculiar property."⁽¹⁾ The appellant had produced 21 Benares pandits before the Court all of whom had opined that the widow gained an absolute interest in her property whereas the respondent had produced 37 Benares pandits who claimed that the widow secured a limited interest only. From amongst the Court pandits all the Benares pandits were in favour of absolute estate whereas the Calcutta pandit and two other pandits declared their opinion in favour of limited estate only.⁽²⁾ The case being the most important one in the sphere of strīdhana the reasoning and the grounds of the decision of their Lordships must be examined in detail.

Their Lordships first abstracted immoveable property from the question⁽³⁾ by wholeheartedly following their decision in Thakore Deyhee's case.⁽⁴⁾ Then their Lordships proceeded to the question of moveable property and referred to a case under the Mithila school cited at the Bar from Indian Jurist of the 31st March of 1866⁽⁵⁾ in which it was laid down that as regards the

(1) Ibid at pp.513-14.

(2) Ibid at pp.501-3. The property was inherited by two co-widows and one of them had disposed of her own share which she was holding as a result of the partition between the two.

(3) 11 M.I.A.487 at 505.

(4) (1866) 11 M.I.A.139.

(5) 11 M.I.A.487 at 507. From the remark it appears that the case is the same which is reported in Criminal and Civil Reporter Vol.II.190 as Brojorutton v. Poorandi.

absolute right of the widow over the inherited moveable property the law of the Mithila school was on all fours with the law of the provinces governed by the Mitākṣarā. The case had also referred to the two decisions of the Madras Suudder Court⁽¹⁾ and two decisions of the Bombay High Court⁽²⁾ giving absolute right of disposal over moveables. Their Lordships of the Privy Council were not satisfied that the statement in the decision of the above-mentioned case was correct. They further observed that all these cases were respectively decided according to the law of ^{the} Mithila school or according to the law peculiar to the Bombay and Madras Presidencies and that it could not be applied to a case of the Benares school.⁽³⁾

Observing that Vijñāneśvara has not distinguished between inherited moveables and immoveables their Lordships further reasoned that as immoveable property has already been declared in Thakore Deyhee's case to be not strīdhana "The legitimate inference from this seems to be, that neither moveable nor immoveable property inherited from her husband forms part of a woman's peculium or stridhun."⁽⁴⁾ Their Lordships relied on Macnaughten's statement to this effect.⁽⁵⁾

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- (1) 11 M.I.A.487 at 508. The decisions are S.D.A.(1845) p.117 and S.D.A.(1850) p.77.
 (2) For these see *infra*. Their Lordships also referred to case No.VII in Macnaughten Vol.II.46.
 (3) 11 M.I.A.487 at 509.
 (4) 11 M.I.A.487 at 510.
 (5) Ibid at 511.

Remarking that Kātyāyana's text about limited estate applies to both moveables and immoveables inherited from the husband⁽¹⁾ their Lordships observed that 'treatises current in other schools' do not support the extension of strīdhana as introduced by the Mitākṣarā. They further added "Both the Vivada-Chintamani and the Mayukha confine strīdhun within the definitions of Manu and Katyayana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitacshara, but are excluded by Sir W. Macnaughten."⁽²⁾ Referring to the fact that the husband has been mentioned as an heir to the strīdhana of a woman in default of her issue their Lordships said "This is intelligible, if the words 'property which she may have acquired by inheritance' in the second clause, are considered to be property inherited in her husband's life-time, or from some persons other than him."⁽³⁾

With respect for their Lordships it must be submitted that the grounds on which their Lordships relied upon for their decision and the process of reasoning which they adopted is far from convincing and that they have given in this case a decision which merely enlarges the scope of the mistake they committed by giving an incorrect decision in Thakore Deyhee's case.

(1) Ibid.

(2) Ibid at 512.

(3) Ibid at 513.

Firstly, the decision in Thakore Deyhee's case has been enlarged into a broader proposition only on the authority of Macnaughten and without citing a text or a case of the Benares school in its favour. Secondly, the process whereby the judicial precedents of the Mitākṣarā school have been distinguished as pertaining only to the law of a particular sub-school and whereby reliance has been placed on the text of Kātyāyana which has not been referred in the Mitākṣarā and has been differently interpreted in the commentaries that follow the Mitākṣarā, is highly objectionable. In ascertaining the law of the Benares school the decisions pertaining to the law of the other Mitākṣarā sub-schools should have carried more weight than the misleading statement of a text-book writer. Thirdly, instead of referring to the Vivādachintāmaṇi and the Mayūkha their Lordships could have more profitably referred to the authorities of the Benares school, viz. the Vīramitrodaya or the Vivādatāṇḍava which wholeheartedly support the doctrine enunciated in the Mitākṣarā. Fourthly, the logic whereby their Lordships observe that the wife cannot take property inherited from her husband as her strīdhana as the husband himself has been mentioned as an heir to her strīdhana in default of her issue, appears to be strange.⁽¹⁾ For, more often than not, heirship has been mutual in Hindu law. If a person is held not to gain

(1) See the comments of West J. on this reasoning in *Vijiarangam v. Lakshuman* (1871) 8 Bom.H.C.R. 244 at 272-73. It is surprising to find that the same logic has been adopted in Mayne 11th edition pp.728-29.

absolute interest in the property of another person simply on the ground of the other person being mentioned in the law as a possible heir to the former, it must be submitted that almost no heir under Hindu law would gain an absolute estate in inherited property. Thus a husband would not gain absolute estate in the property which he inherits from his wife because also the wife has been mentioned as an heir to the husband's property in the absence of his son, son's son, or son's son's son. Similarly even a son would not inherit his father's property with an absolute interest therein for even the father is one of the possible heirs to the son's property. However, it must be specially noted that their Lordships admitted at least that the Mitākṣarā explanation of the word 'ādya' might include property inherited by a woman from some persons other than her husband - a suggestion which was flatly denied by their Lordships in their subsequent decisions.

It is not necessary to discuss any further the reasoning of their Lordships in this case. These two decisions of their Lordships of the Privy Council, however, gave a lamentable turn to the flow of Hindu law; for in the later cases in which these decisions were followed with all sorts of far-fetched and unreliable analogies the original mistake went on assuming wider and wider proportions.

After these two decisions all the High Courts in India except the Bombay High Court started on their way to accept a

broader proposition, namely, inherited property is not strīdhana according to the law of the Mitākṣarā school. In Deo Persad v. Lajoo Roy⁽¹⁾ and Dowlut Kooer v. Burma Deo⁽²⁾ their Lordships of the Calcutta High Court decided that a daughter succeeding to the estate of her father takes only a limited estate in the same and that it does not become her strīdhana. In the second case it was stated that the law was applicable to cases both under the Mitākṣarā and the Dāyabhāga schools. In Phukar Singh v. Ranjit Singh⁽³⁾ their Lordships of the Allahabad High Court held that property inherited by a grandmother from her grandson is not strīdhana. Their Lordships extended the ratio of Bhagwandeem's case to the case before them.⁽⁴⁾ In Kutti Ammal v. Radakristna⁽⁵⁾ their Lordships of Madras High Court held that the property which a mother inherits from her son is not strīdhana. The Bombay decisions which, as far as possible, accepted the liberal interpretation of the word strīdhana as given in the Mitākṣarā will be set out below.

(1) (1873) 14 B.L.R.245.

(2) (1874) 14 B.L.R.246. As was common in those days the authority of Macnaughten was relied upon in this case. In this and in Deo Persad's case the Bombay decisions were distinguished as being not applicable to the Bengal province.

(3) (1878) 1 All.661. Macnaughten 3rd edi.p.38 and Strange 4th edi. Vol.I.144 were relied upon and the decision in Bijya v. Unpoorna (supra) and the two P.C. cases were followed.

(4) 1 All. 661 at 663.

(5) (1875) 8 M.H.C.R.88. In Madras the law on this point has long been settled and was confirmed in Collector of Masulipatam v. Cavalry (1860) 8 M.I.A.500.

The question about the nature of the interest of a daughter in ^{the} property inherited from the father came before their Lordships of the Privy Council through a Mitākṣarā case from Calcutta: i.e. Chotay Lall v. Chunno Lall⁽¹⁾ in which their Lordships of the Calcutta High Court reviewed almost all the decisions of the different High Courts and preferred to confirm the precedents of their own High Court. The grounds on which their Lordships of the Calcutta High Court appear to have brushed aside the decisions of the Bombay High Court do not appear to be convincing. As regards one Bombay case⁽²⁾ they say : "It is to be remarked upon this decision, that the learned judges considered the text of Manu and the opinions of the commentators and other authorities on Hindu law, but they do not appear to have been aware (at least they do not notice) any of the decisions of the Courts on this side of India on the subject: and in considering whether we should treat this case as an authority, this is very material. We may fairly say that a judgement of another High Court in which no notice was taken of the decisions of this Court upon the point, ought not to receive the same respect from us as it would receive if the learned judges had considered the decisions on this side of India."⁽³⁾ Their Lordships passed a similar remark on the judgement of Mr. Justice West

(1) (1878) 6 I.A.15.

(2) Navalram v. Nandikishore (1865) i Bom.H.C.R.209.

(3) 6 I.A.15 at 21.

(in Vijiarangam v. Lakshuman)⁽¹⁾ who, according to their Lordships, had argued that Bhugwandeem's case⁽²⁾ was not correctly decided.⁽³⁾ Admitting that he had discussed the Mitākṣarā text and other authorities "with much ability" their Lordships, however, added, "Certainly, when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decisions of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last fifty years on account of the opinion of a judge of a High Court at Bombay, however learned he may be."⁽⁴⁾

It must be submitted that it would have been better if their Lordships of the Calcutta High Court had investigated into the textual authorities which had been discussed in the Bombay decisions. There is not a single 19th century case of the Calcutta High Court or even of the Privy Council in which so elaborate and learned a discussion of the textual authorities has been made as

(1) (1871) 8 Bom.H.C.R.244 see infra.

(2) 11 M.I.A.487 supra.

(3) See the remark in 6 I.A.15 at pp.22-23. It seems that the discussion has been treated here with scant respect. But West J. in Bhagirthibai's Full Bench case (see infra pp.153-54) showed how fallacious was the reasoning which formed the foundation of the decision of their Lordships of the Calcutta High Court in Chotay Lall's case. It seems, however, that the latter soon realised the value of this eminent judge and scholar; for in a later Full Bench case they frankly admitted that "Great weight is due to any opinion of that learned judge on a question of Hindu law." - Sorolah v. Bhoobun 15 Cal.292 F.B.at 314.

(4) 6 I.A.15 supra at pp.22-23.

was made by Mr. Justice West in Vijiarangam's case. The older decisions of the Bengal Courts were given merely on the questionable authority of Sir William Macnaughten.⁽¹⁾ It was high time that the decisions based on incorrect authorities were reversed even at the cost of endangering existing titles as it would correctly have regulated at least the future growth of the law.

When the case came before their Lordships of the Privy Council the decision was confirmed and their Lordships held their decisions in Thakore Deyhee's case and Bhugwandeem's case⁽²⁾ as being applicable to the case of a daughter succeeding to her father's property.⁽³⁾ Instead of going into the respective values of the decisions of the different Courts in India, their Lordships simply depended on the opinion of Sir William Macnaughten to the effect that such property does not have strīdhana succession according either to the Benares or Bengal school. As regards the word 'ādyā' in Yājñavalkya's verse their Lordships observed that the correct translation of the word should be 'or the like' instead of 'as also any other (separate aquisition)'.⁽⁴⁾ Scrutinising the Mitākṣarā interpretation on this verse of Yājñavalkya their Lordships said, "The original text does not afford any foundation for

(1) They were also based on the Dāyabhāga etc. which are of no use in ascertaining the law of the Mitākṣarā school.

(2) See *supra*.

(3) 6 I.A.15 at 31.

(4) 6 I.A.15 at 31. It need not be repeated here that the translation 'et cetera' appears to be a better one - see *supra* pp. 65-66.

the argument in favour of the right of the widow and daughter to the entire estate in land acquired by inheritance; the interpretation no doubt does."⁽¹⁾ But then their Lordships further observed that the rule of inheritance as settled by a long course of decisions in Bengal and Bihar ought not to be unsettled unless it was 'opposed to the spirit and principles of the law of the Mitakshara' which, 'on the contrary', appeared to their Lordships 'to be in accordance with them'.⁽²⁾ It is to be noted that the very passage in the Mitākṣarā which their Lordships in Bhugwandeem's case considered to be ambiguous ⁽³⁾ was accepted by them in this case to be unequivocal as regards the proposition: inherited property is strīdhana. It is lamentable that in violation of the principles of interpretation laid down by themselves in a previous case, namely, Collector of Madura v. Muttu Ramalinga⁽⁴⁾ their Lordships in Chotay Lall's case placed reliance on the text of Yājñavalkya as contrasted with that of his commentator.

Following their decision in Chotay Lall's case their Lordships of the Privy Council confirmed the decision of the Madras High Court on the same point in Muttu Vaduganadah v.

(1) 6 I.A.15 at 31.

(2) The decision is obviously opposed to the spirit of the Mitākṣarā. Moreover there is no text of any smṛiti which extends the limited estate of a widow to property inherited by a daughter, and none of the authors of the Mitākṣarā school appears to make a provision to that effect.

(3) *Supra* p.134.

(4) (1868) 12 M.I.A.397 at 436. It is to be noted that the decision in Chotay Lall's case was given after the decision in Collector of Madura's case.

Dorasingha⁽¹⁾ and declared that the law is the same in 'Carnatic' where the Smṛitichandrikā and the Mādhavīya are of great authority. It may only be remarked that the authorities of the Southern school are in full support of the doctrine that inherited property is strīdhana.

It has already been noticed that the property which a daughter inherits from the mother and the father respectively had been held to be not her strīdhana in Madras and in Calcutta respectively. The ratio of these decisions being a broad one, namely, inherited property is not strīdhana both the High Courts applied the same principle to property which a female inherited from either a male or female⁽²⁾ including, of course, the property which a daughter inherited from her mother according to strīdhana

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- (1) (1881) 8 I.A.99. Mayne who appeared on behalf of the appellant referred to the Mitākṣarā and to Strange (1830 edi.) pp.130,137 etc. but failed to convince their Lordships that the law in the Madras province was in fact different from the one settled in Chotay Lall's case. It is also to be noted that although the opinion of their Lordships was read by Sir Arthur Hobhouse it was at the instance of Sir Barnes Peacock, a member elevated from the bench of the Calcutta High Court, that the respondent's counsel was not called upon to reply to Mayne's argument on the point of strīdhana. Their Lordships were also wrong in holding that the Smṛitichandrikā and the Mādhavīya do not follow the Mitākṣarā "in assigning to a woman as her strīdhana property inherited by her."
- (2) Virasangappa v. Rudrappa (1886)19 Mad.110 at 118; Venkayamma v. Venkataramanayamma (1902)29 I.A.156; Raju v. Ammani (1909)29 Mad. 358; Subramania v. Arunachalam (1905)28 Mad.F.B.1; Janakisetty v. Miriyala (1909)32 Mad.521; Mullangi v. China (unreported case approved in Janakisetty's case); Raghavalu v. Kamsalya A.I.R.1937 Mad.607; Venkateswarlu v. China (1955) Andh.W.R.39. For the Calcutta see Jullessur v. Uggur Roy (1883)9 Cal.725; Huri Dayol v. Grish Chunder (1890)17 Cal.911; Madhumala v. Lakshan (1913)20 C.W.N.627; Jogendra v. Phani Bhushan (1916)43 Cal.64; Mohendra v. Dakshina A.I.R.1936 Cal.34; Sisir Kumud v. Jogeneswar (1938) 42 C.W.N.359.

Gunnam Papamma v. Valluri Kamaraju 1955 And.W.R.779.

succession. (1)

In other parts of India the Courts were reluctant to extend the principle laid down in Bhugwandeem's case to the case of a daughter succeeding to her mother's strīdhana. In Sheo Shankar v. Debi Sahai (2) their Lordships of the Privy Council reversed the decision of the Allahabad High Court and held that a female inheriting even from a female takes only limited estate in the property. Referring to the text of the Mitākṣarā, their Lordships said that the property which a woman inherits from a male has already been declared to be not strīdhana and that there was a remarkable concurrence of opinion amongst judges, scholars and text-book writers that no distinction could be made between property which is inherited by a female from a male and from a female. (3)

(1) Janakisetty v. Miriyala (1909) 32 Mad.521; Huridayal v. Grish Chunder (1890) 17 Cal.911; Madhumala v. Lakshun (1913) 20 C.W.N. 627. An obiter dictum of their Lordships of the Madras High Court in Venkataramakrishna v. Bhujanga (1896) 19 Mad.107 to the effect that property which a daughter inherits might form an exception to the general rule that inherited property is not strīdhana, was not followed in Janakisetty's case. In Huridayal's case, which was a Dāyabhāga case, the decision was given on the authority of the Dāyabhāga and the Dāyakramasaṅgraha and the opinion of Jagannātha to the effect that the daughter can alienate such property at pleasure was disapproved on the basis that Jagannātha's opinion is not in itself a sufficient authority "when he speaks in his name" - especially when his provisions are opposed to those of Jīmuta and Śrīkṛṣṇa. Similarly Macnaughten's opinion to the effect that such property is not strīdhana or peculium of the daughter is followed but his opinion that such property devolves upon the daughter's heirs has been disapproved.

(2) (1903) 30 I.A.202.

(3) For this point their Lordships relied upon the authority of Banerjee, West & Buhler, Jolly and upon the opinion expressed in the judgements of West J., Telang J., and Best & Ayyar JJ. respectively in Vijiarangam v. Lakshman (1871) 8 B.H.C.R.244 at 272, Manilal v. Bai Rewa (1892) 17 Bom.758 at 761 and Virasangappa v. Rudrappa (1895) 19 Mad.110 at 118. Their Lordships

The Calcutta and the Madras cases were apparently approved by their Lordships though there was no Benares precedent on this point. The Bombay decisions were distinguished as being based on the authority of the Mayūkha. Ultimately their Lordships praised Macnaughten and approved his authority on this point.⁽¹⁾

Immediately after this case their Lordships of the Privy Council reversed an excellent judgement of the Oudh Court⁽²⁾ in which the Judicial Commissioner had very ably discussed the provisions of the Mitākṣarā, the Vīramitrodaya and the Vivādatāṇḍava and had pointed out that the texts of Kātyāyana and Nārada do not touch the daughter's case at all. No new arguments could be adduced in favour of the doctrine of the reverter and therefore their Lordships of the Privy Council simply followed their previous decisions.

simply followed the previous decisions mentioning that in those cases they had "examined the primitive texts upon which the Mitacshara puports to be based" and that "they had considered the fundamental principles of Hindu law" also. See report at p.208.

- (1) 30 I.A.202 at 208. Their Lordships observed that Pontifex J. had expounded the law to the same effect in Chotay Lall's case. But see Banerjee p.356.
- (2) Sheo Pertab v. Allahabad Bank (1903) 30 I.A. 209. For the judgement of the Oudh Court see Lal Sheopartab v. The Allahabad Bank () O.C. 130. The decision of the Oudh Court appears to be correct both according to Hindu law and according to Oudh Estate Act I of 1869.

Since this case, however, all the Courts in India except those of Bombay held that property inherited by a female whether from a male or a female is not her strīdhana and reverts to the heirs of the previous owner male or female as the case may be.⁽¹⁾

According to the Mithila school, however, the moveable property which a widow inherits from her husband has always been recognised to be at her free disposal.⁽²⁾ Being at free disposal

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- (1) Sham Behari v. Ramkali (1923) 45 All.715; Ramkali v. Gopal Dei (1926) 45 All.658; Gaya Din v. Badri Singh I.L.R. (1943) 230 at 235; Kehar Singh v. Attar Singh A.I.R. (1944) Lah.442 at 444; Matru Mal v. Mehri Kunwar A.I.R. (1940) All.311; Venkateswarlu v. Chinna Raghayulu A.I.R. 1957 Andh.Pra. 604. In Matru Mal's case the daughter was held to have taken only limited estate in the property which she had inherited from her mother and the daughter's daughter was preferred to the daughter's son but the expression 'her heir' has been used ambiguously so that it creates an impression that the daughter's daughter succeeded to the estate as an heir to the daughter. It is also to be noted that the decision in this case rests entirely upon the authority of Mulla's Hindu Law. See also Varada Char v. Yedoogiri (1883) 6 Mys. L.R. 29; Nanki v. Nathu (1886) 1 C.P.L.R. 45; Khushal v. Dalsingh (1896) 1 C.P.L.R. 77; Mula Bai v. Mohraj Singh (1888) 2 C.P.L.R. 166; Ayikutti v. Chithambarathanu (1890) 8 T.L.R. 51 (no custom to the contrary amongst the Krishnavakas); Nagamani v. Chinnakannu (1892) 10 T.L.R. 37; Isakki v. Narayanan (1892) 10 T.L.R. 74; Ramacharan v. Jagannath (1898) 12 C.P.L.R. 143; Venkata v. Puttaiya (1902) 7 M.C.C.R.1; Govindji v. Gosalia (1904) 4 K.L.R. 234 (no custom amongst the Bakhais of Kathiawar to the effect that a widow takes absolute interest in inheritance); Puthumadan v. Thanvan (1904) 20 T.L.R. 209; Roy Radha v. Nauratan (1907) 6 C.L.S. 490; Puthumadan v. Thanvan (1909) 26 T.L.R.1; Pathan v. Kuchumini (1911) 28 T.L.R. 61.
- (2) The earliest cases appear to be Corformah's case (1812) referred to in Cossinaut v. Hufoosoondry (1819) 2 Mor.Dig.198 at 216; Rajunder v. Bijay (1839) 2 M.I.A.181 (more known as Bhya Jha's case); Brojorutton v. Mt.Poorandi (1866) Revenue Civil and Criminal Reporter Vol.II p.190. In Bhagwandeem's case their Lordships of the Privy Council apparently accepted that this was the correct position of the law as far as the Mithila school was concerned. The decisions in Thakore Deyhee's case, Bhugwandeem's case and Chotay Lall's case, though based on the general authority of the Mitākṣarā, were expressly limited to the law of the Benares school.

of the woman such property is her strīdhana and descends as such.⁽¹⁾

The case of a Jain widow is ^a customary exception to the rule that inherited property is not strīdhana. She gets an absolute interest in the property, moveable or immoveable, which she inherits from her husband. As the Mitākṣarā does not make any distinction between strīdhana and the property which is at the absolute disposal of a woman,⁽²⁾ such property has been held to be her strīdhana and it devolves as such.⁽³⁾ However, the right

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- (1) Sureshar v. Maheshrani (1921) 47 I.A.233 at 238; Latur Rai v. Bhagwan Das A.I.R. (1936) Pat.80; Jagarnath Prasad v. Suraj Deo A.I.R. (1937) Pat. 483.
- (2) For this reasoning see Hukumchand's case *infra*.
- (3) In Sheo Singh v. Dakho (1878) 5 I.A. 87 the widow was given absolute right in her husband's self-acquired property. In Shimbhunath v. Gayan Chand (1894) their Lordships of the Allahabad High Court extended this right to the 'non-ancestral' property of the husband. See also Harnath Pershad v. Mandil Dass (1900) 27 Cal.379; Nekram Singh v. Srinivas (1926) 24 A.L.J.751; Pahar Singh v. Shamsher A.I.R. (1931) All.695; Hukum Cnagd v. Sital Prasad (1927) 50 All.232; Chauhi v. Meghoo I.L.R. (1945) All.804; Sahu Joti v. Bahal Singh I.L.R. (1946) All.1. The obiter dictum of their Lordships of the Calcutta High Court in Harnath Pershad's case to the effect that the application of this customary right of the widow could be extended to the joint family property of the husband, was not followed by their Lordships of the Allahabad High Court in Nekram Singh's and Pahar Singh's cases. In the latter the Calcutta decision was distinguished as being the law of a different province. However, the daughter's right to take absolute interest in property inherited from her father was decided by their Lordships of the Privy Council who held that a custom to that effect was not proved. In Bombay, however, only ordinary Hindu Law was held to be applicable to the widows of the Dasha Shrimali Porwad community of Jains. In Bhikubai v. Manilal A.I.R.(1930) Bom.517 Patkar J. rejected the authority of the Sanskrit texts of the Jains and observed, "... the texts from Arhan Niti, Bhadrabahu Samhita and Vardhamana Niti are conflicting and relate to a state of society of the Jains when the widow was preferred to a son and would not be binding on the courts in view of the Privy Council decisions that the Jains are governed by Hindu law in the absence of a custom." For the texts see *infra* p.602.
- See also Krishna Bai v. Secretary of State for India (1920) 42 All.555; Ayisvaryanandaji v. Sivaji (1926)49 Mad.116 at 152-53.

is held to be limited only to the 'non-ancestral' property of the husband. As regards his joint family property there being no custom to that effect the ordinary Hindu law is applicable which gives only a right to be maintained out of such property.

The decisions of the Bombay High Court preceeded from the first upon a different line. From the early part of the 19th century the bench of Bombay High Court was adorned by several erudite judges who, in dealing with cases on Hindu law, depended upon the authorities of the Sanskrit texts ^{here} ~~rather~~ upon the opinion of the text-book writers like Macnaughten, Strange etc.

As early as in 1810 A.D. the Sudder Court in Deo Baee v. Wan Baee ⁽¹⁾ accepted the opinion of the pandits who relied on the Mitākṣarā and opined that a widow who inherits the property of her husband 'has a full right and power over her late husband's property'. In Kapoor Bhuwantee v. Sevukram ⁽²⁾ it was held on the authority of the Mayūkha that a widow is entitled to give away for any religious purposes property which she has inherited from her husband. Denying the contention that an alienation made by a widow without the consent

- (1) (1810) Borr. I.29. But see Chuneelal v. Jussoo Mull (1809) Borr.I.60; Ganga v. Jeevee (1811) Borr.I.426 and Ram Koonwur v. Ummur (1818) Borr.I.458 which appear to ^{have} ~~limited~~ widow's right of disposition. See also Krishnaram v. Mt. Bheekhee (1822) Borr.II.362 in which the court appears to have mistaken the ratio of the decision in Poonjeeabhaee v. Frankoonwur (1817) Borr.I.194 and to have come to the conclusion that a daughter inheriting property from her father takes only limited interest in the same. See also Madhowrao v. Yuswada (1822) Borr.II.460 in which the widow was held entitled to ^{of} ~~dispose~~ only moveable property.
- (2) (1815) Borr.I.448; Lukmeeram v. Khooshalee (1817) Borr.I.455. Borradaile remarks that this was the correct position of the law - see his notes to the cases of Chuneelal, Kapoor Bhuwantee and Lakmeeram supra.

of the next reversioners is null and void the Sudder Court, in Dae v. Ganpat,⁽¹⁾ emphasised the fact that the restriction on alienation applies only to gifts in favour of actors, dancers etc. and that according to the Mayūkha and the Vīramitrodaya 'a woman is not subject to control in making a gift to secure happiness in another world.' It was further observed by the court that the required consent of the reversioners was meant only for giving a formal proof of the fact as to whether the family was separate or joint and where the husband is decidedly separate alienation made by his widow without the consent of the reversioners is valid.

Coming to the decisions of the Bombay High Court, in Pranjivandas v. Devkuvarbai,⁽²⁾ Sausse C.J. held that the widow has an uncontrolled power over the moveables inherited from the husband and that the daughter takes an absolute interest in the property inherited from her father. He relied on the Mitākṣarā, the Mayūkha, the custom as prevalent in the Western India and as stated by Steele, and on the opinion of the Śāstris. In Navalram v. Nandkishor⁽³⁾ it was held that the property which a daughter inherited from her father "whether or not it be strictly entitled to the name of stridhan or peculium" descends on her death to her own heirs.

(1) (1849) Perry's Oriental Cases p.

(2) (1859) 1 Bom.H.C.R.130. For Custom as a source of modern Hindu law see infra pp.506-10. For Steele see infra. pp.623-25.

(3) (1865) 1 Bom.H.C.R. 209.

Their Lordships treated Jagannātha and Macnaughten as of little authority outside Eastern India⁽¹⁾ and approved a passage from Strange's work wherein the author states that inherited property is strīdhana according to the law of the Mitākṣarā school and descends as such.⁽²⁾ In Venayeck v. Luxoomeebae⁽³⁾ their Lordships^{of the Privy Council} confirmed the decision of the Bombay High Court that a sister inheriting her brother's property takes absolute interest in it. Following the decision Arnould J. in Bhaskar v. Mahadev⁽⁴⁾ observed that the general provision of the Mitākṣarā to the effect that inherited property is strīdhana should be treated as law in Western India subject only to the exception laid down by their Lordships of the Privy Council in Bhugwandeem's case,⁽⁵⁾ namely, property inherited by a widow from her husband is not strīdhana. It may be mentioned that the decisions of the Bombay High Court, though quite in conformity of the law of the Mitākṣarā, were against provisions of the Mayūkha⁽⁶⁾ and the customs of Gujrat.⁽⁷⁾

(1) Ibid at pp.216 and 218.

(2) Ibid at p.215. For Strange's passages see *Supra* p.124.

A passage from the Manual of Hindu Law of Mr. Justice Strange also was approved. But Macnaughten's passage (*supra* p.123) was disapproved as being contrary to the Mitākṣarā. It is to be noted that the note added to Steele's work by Bhālachandra Śāstri to the effect that Śāstris in Gujrat do not include in strīdhana property inherited by a woman, was not well-received by their Lordships who further observed that even if it were not to be treated as strīdhana it would devolve upon the heirs of the woman herself.

(3) (1864) 3 W.R.(P.C.)41.

(4) (1869) 6 Bom.H.C.R.1 followed in *Rindabai v. Anacharya* (1890) 15 Bom.206.

(5) 6 Bom.H.C.R.1 at 16-17.

(6) *Supra* pp. 88-96.

(7) *Supra* p.96 and *infra* pp.626-27 for Gujrat Caste Rules.

from the Śāstric point of view,

Consequently, they must be treated as being incorrect as regards that part of the Bombay province which is governed by the Mayūkha in preference to the Mitākṣarā.

In Vijiarangam v. Lakshuman,⁽¹⁾ while approving the previous decisions of the Bombay High Court as regards property inherited by a daughter from her father, Mr. Justice West took the opportunity of discussing many basic questions about strīdhana and of commenting upon the Sanskrit texts as well as the decisions of their Lordships in Thakore Deyhee's case and Bhugwandeem's case. He then observed : "Unreservedly accepting their Lordships determination as conclusive in all similar cases arising under the same laws, I should not feel bound by the reasoning on which it is founded to the inference that for Hindus in Bombay the doctrine holds good that a husband's property inherited by a widow is not stridhan, with the logical consequence, drawn by Eastern lawyers, that no inherited property is stridhan."⁽²⁾

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- (1) (1871) 8 Bom.H.C.R.244. West J. pointed out that if such property is not to be treated as devolving upon the strīdhana heirs of the daughter then it must be noted that no special rule for the devolution of such property has been mentioned in the Mitākṣarā. Such rules have been specially mentioned in the case of the property of a celebrate student, an ascetic, a foreign merchant etc. - see Yaj. 2.136 and 2.264.
- (2) 8 Bom.H.C.R.244 at 266-68.

The rule that a daughter takes an absolute estate in property inherited from her father was followed in all the later cases in Bombay and was applied also to property inherited by a daughter from her mother. ⁽¹⁾

In the Full Bench case of Bhagirthibai v. Kahanjirao ⁽²⁾ Mr. Justice West gave a judgement which might be considered to be the best attempt to expound, according to the Mitākṣarā, the meaning of the term strīdhana. The main points of his arguments were as follows:-

In the first place, according to the Mitākṣarā inherited property is strīdhana and that at least in Bombay the widow has long since been held by scholars and by judges to be entitled to the entire estate of the husband with full rights of disposal over it. ⁽³⁾ Secondly, West J. argued that the supposed restriction on the widow was incorrectly applied by analogy to other heirs like the mother and other female heirs entering into the family. ⁽⁴⁾

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- (1) Haribhat v. Damodarbhat (1879) 3 Bom.171; Babaji v. Balaji (1881) 5 Bom.660; Bulakhidas v. Kesavlal (1882) 6 Bom.85; Bhagirthibai v. Kahnunjirav (1887) 11 Bom.285 F.B.; Jankibai v. Sundra (1890) 14 Bom.612; Gulappa v. Tayawa (1907) 31 Bom.453; Vithappa v. Savitri (1910) 34 Bom.510; Kisan v. Bapu (1925) 27 Bom.L.R.670; Balwant Rao v. Baji Rao (1920) 47 I.A.213; Jawahir Lal v. Jarau Lal (1924) 46 All.192 (the parties were Nagar brahmins who had migrated to Aligarh in U.P. from Vadnagar in the Baroda state). In Jakibai v. Sundra (14 Bom.612 at 617) Jardine J. admitted that the absolute estate of the daughter was 'stridhan in some sense of the word.'
- (2) (1886) 11 Bom.285.
- (3) See ibid at pp.297-99 where West. J. refers to Deo Baee v. Wan Baee, Kapoor Bhuwanee v. Sevukram, Doe v. Ganpat etc. For these cases see supra.
- (4) 11 Bom.285 F.B. at 300.

He maintained that Jīmūtavāhana has made the exception in the case of a widow a general rule not applicable even to the daughter etc. which is totally incorrect and without any authority, and further observed that the process of applying this law of the Bengal school to the cases arising under the law of the Benares and other sub-schools of the Mitākṣarā had been responsible for the decisions in Chotay Lall's case and Vaduganatha's case.⁽¹⁾

In Bombay the rule enabling a daughter to take an absolute interest in the property inherited from the father has been extended to all females inheriting from their gotraja males i.e. males in whose family the female heir is born.⁽²⁾

It has already been shown that the decision of their Lordships in Bhugwandeem's case had been treated in Bombay as an exception to the general rule that inherited property is strīdhana.⁽³⁾

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- (1) Ibid p.305. It is important to note that West J. maintains that full ownership does not necessarily involve rights of disposal over the property owned. - see the report at p.309. In Balwant Rao v. Baji Rao (1920)47 I.A. 30 at 42 Lord Dunedin admitted that the position of the Bombay law, although it was declared by the Bombay High Court for the first time in Pranjivandas's case, was settled long before that decision as shown by the decision in Deo Bae v. Wan Bae (1810)Borr.I.29 and censured the Judicial Commissioner in Balwantrao's case for having refused to apply that law to this case on the ground that the parties concerned had migrated to the Central Province from Berar before the decision in Pranjivandas's case was given.
- (2) ^{In} Tuljaram v. Mathuradas (1881)5 Bom.662 the ratio was really a broader one, namely, females inheriting from a person into whose family they have not entered by way of marriage take absolute estate in the property.
- (3) Supra p.151.

The exception has been extended, by parity of reasoning, to all females inheriting the estate of males into whose family they have entered by marriage i.e. the mother,⁽¹⁾ the paternal grandmother,⁽²⁾ or a widow of any other gotraja sapinda⁽³⁾ of the propositus.

The Full Bench of the Bombay High Court subsequently decided that all females inheriting from other females take an absolute estate in the property so inherited.⁽⁴⁾ In this case it was held that the paternal grand-mother inheriting from her granddaughter took an absolute estate in the property. Treating the case of widows and widows of gotraja sapindas as exceptions Jenkins C.J. observed, "The principle of dependance which perhaps governs the extent of power may regulate the exceptions where widowed females inherit from males, but in all other cases the

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- (1) Narasappa v. Sakharam (1869)6 Bom.H.C.R.215; Vrijabhukandas v. Bai Parvati (1908)32 Bom.26.
 - (2) Dhondi v. Radhabai (1912)36 Bom.546 (Chandavarkar J. simply extended the rule in Vrijabhukandas's case to this case, but see Mr. Shingne's argument that according to Gandhi Maganlal v. Bai Jabad (1900)24 Bom.192 at 212 the grand-mother comes in her own right and not merely as a widow and that therefore, unlike other widows of the gotraja sapindas she takes an absolute estate.
 - (3) Bharmanganda v. Rudrapagauda (1880)4 Bom.81; Lullobhoy v. Cassibai (1880)7 I.A.212; Gadadhar v. Chandrabhaga (1892) 17 Bom.590 F.B.; Madhavram v. Dave (1896)21 Bom.739; Narayan v. Waman (1922)46 Bom.17.
 - (4) Gandhi Maganlal v. Bai Jadab (1900)24 Bom.192 F.B.

rule of absolute dominion must be allowed to prevail."⁽¹⁾

Originally the moveable property which even a widow inherited from her husband had been treated in Bombay to be at her absolute disposal.⁽²⁾ Later on, however, some conflict arose as to whether such property would follow a course of strīdhana succession or not.⁽³⁾

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- (1) 24 Bom.192 at 214. Macpherson, the appellant's counsel, rightly pointed out that widows of gotraja sapinḍas are themselves not gotraja sapinḍas but sagotra sapinḍas. It is to be regretted that even so learned a judge as Ranade J. uses the word gotraja sapinḍa rather inappropriately in *Madhavram v. Dave* 21 Bom.739 supra. The ratio of *Gandhi Maganlal's* case appears to have been approved by their Lordships of the P.C. in *Kesserbai v. Hunsraj* (1906)30 Bom.431 P.C. at 442. The ratio of the Full Bench case was applied in *Narayan v. Waman* (1922)46 Bom.17 to the property of a female which was inherited by a widow from her distant gotraja sapinḍa but their Lordships in that case appear to be aware of the anomaly that females inherit absolute estate from their female sapinḍas whereas they inherit only a limited estate from their male sapinḍas. *Parshottam v. Keshavlal* (1932)56 Bom.164 was a peculiar case in which the adoptive mother received a life-estate in the property through the grant of her adopted son and later on also inherited the vested interest in the remainder ultimately from the daughter of her adopted son thus attaining an absolute interest in the property.
- (2) *Bechar v. Bai Lakshmi* (1863)1 B.H.C.R.56; *Pranjivandas v. Devkuvarbai* (1859)1 B.H.C.R.1130. Property gifted or bequeathed by the husband and property inherited from the husband appear to have been treated to be on an equal par in *Damodar v. Parmanandas* (1883)7 Bom.155 in which it was held that a widow could dispose of by will the moveable property bequeathed to her by her husband. The estate of a widow in inherited moveable property was not called in question in Bombay for a long time - see *Gadadhar v. Chandrabhagabai* (1892)17 Bom.690 F.B. at 709.
- (3) It appears that the ratio of *Bhugwandeem's* case, namely, that undisposed moveables or immoveables devolve upon the husband's heirs was adopted also in *Harilal v. Pranjivandas* (1888)16 Bom.229 at 232 and *Bai Jamana v. Bhaishankar* (1891)16 Bom.233 at 237. But in *Murarji v. Parvatabai* (1876)1 Bom.177 it appears that the view in *Damodardas's* case was adopted in as much as it was assumed that the widow could dispose of the inherited moveables by will, the disputed question in this case being only about the validity of the will.

In Gadadhar v. Chandrabhagabai⁽¹⁾ the Full Bench of the Bombay High Court considered the question whether the widow could dispose by will of inherited moveables. Sir Charles Sargent C.J. quoted the remarks of their Lordships of the Privy Council in Bhugwandeem's case, namely, that the widow's "power of disposition over both moveable and immoveable property is limited to certain purposes, and on her death both pass to the next heirs of her husband"⁽²⁾. Declaring that the decision of the Privy Council was to be given effect to "throughout the presidency" he expressed the opinion of the Full Bench thus : Assuming then, as we think we must, that the moveables existing at the time of the widow's death devolve, by inheritance, on her husband's heirs, we think the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs.⁽³⁾"

With due respect to their Lordships it must be submitted that this appears to be the first error into which the

(1) (1892)17 Bom.690 F.B.

(2) 17 Bom.690 at 708. See also Thakore Deyhee's and Vaduganatha's cases referred to at report pp.710 and 708 respectively.

(3) Ibid p.711. The decision in Damodardas's case was overruled to this effect only.

Bombay High Court fell of its own volition. The decision in Bhagwandeem's case was expressly limited to the law of the Benares school only and a possibility of a different interpretation in other schools was not excluded. Moreover the power of alienation over the inherited moveables being held equal to that over immoveables in Bhugwandeem's case a common rule of reverter in both kinds of property does not appear to be illogical. But in Gadadhar's case the rule of reverter was declared without questioning the right of the widow to alienate the inherited moveables by gift inter vivos. Again the decision in Bhugwandeem's case could not have affected the previous decisions of the Bombay High Court recognising an absolute power of the widow over inherited moveables since those decisions were based both on the textual law and a usage of the country to that effect.⁽¹⁾

However, after the above decision the moveable property which a widow inherits from her husband and which, according to the general rule that absolute property of woman is strīdhana, should have been treated as her strīdhana, has ceased to be so in as much as it does not devolve like strīdhana after the

(1) See Pranjivandas's case supra. p.150.

widow's death.⁽¹⁾

The second disputed question about the acquisition of strīdhana is whether property which a woman obtains on partition of joint family property is her strīdhana.⁽²⁾ Yājñavalkya says : "If (the father) makes equal allotments his wives to whom no strīdhana has been given by the husband or the father-in-law should be made partakers of equal shares."⁽³⁾ Vijñāneśavra commenting on this adds : "But if strīdhana has been given to a woman, the author subsequently directs half a share to be allotted

- (1) In Chamanlal v. Ganesh (1904)28 Bom.453 which was a Mayūkha case the decision of the Full Bench was followed. But in Motilal v. Ratilal (1895)21 Bom.17 Ranade J., while holding that a widow has power to bequeath the moveables bequeathed to her by her husband with express power of alienation, appears to have distinguished Gadadhar's case on two grounds viz. that it referred to inherited property and that it was a Mitākṣarā case whereas Motilal's case was a Mayūkha case. The second ground is obviously wrong. In Pandharinath v. Govind (1907)32 Bom.59 it was decided that under the Mitākṣarā the widow has no power even to gift away the moveable property inherited from her husband. Notwithstanding the argument of Mr. Gharpure, the appellant's counsel, that Gadadhar's case does not affect the power of alienation inter vivos (see 32 Bom. 59 at 62) Russell A.C.J. held that the widow's power of testamentary disposition being denied in Gadadhar's case and the analogy between gift inter vivos and gift by will being complete in Hindu law the widow cannot have a power to dispose of the moveables even by gifts inter vivos - see 32 Bom.59 at 74-75. It need not be added that the previous decisions stated the law as existed in the Western India and not as it existed only in the Mayūkha districts. However, it seems that in the Mayūkha districts the widow still appears to have unrestricted right to dispose of moveables during life-time - see Chamanlal v. Bai Parvati A.I.R.1934 Bom.151 at 154. See also Nanji v. Bai Hemi (1927)3 W.I.S.L.R.81.
- (2) For women capable of getting a share on partition see Mayne pp.529-38.
- (3) Yaj. 2.115

to her : 'Or if anything has been given, let him assign the half'",⁽¹⁾ and then connects this verse to the verse which makes provision for a woman's ādhivedanika or gift on supersession.

From the very fact that Yājñavalkya treats strīdhana as a substitute for a share to be given to a woman on partition it is clear that he treats such share to be strīdhana. Moreover the provision about allotting such share is connected in the Mitākṣarā with the provision concerning gift on supersession. It has already been shown that gift on supersession was introduced in the śāstra for the purpose of giving to the superseded woman her share in the joint property of the husband and wife.⁽²⁾ If such gift on supersession is to be treated as strīdhana there is no reason why a share given to a woman in a partition of the joint family property should not be treated as her strīdhana.

Although no practical illustration of the rule 'inherited property is strīdhana' is to be found in the Mitākṣarā,⁽³⁾ such an illustration in regard to partitioned property is actually found therein. While conferring on an after-born son a right to inherit the share which his mother had secured on partition

(1) Mit. on Yaj. 2.115. The words in the single inverted commas form a part of Yājñavalkya's verse concerning gift on supersession for which see supra p.72. . The analogy has been accepted by almost all the commentators. For an explanation of the analogy see Vi.Mi.441.

(2) See supra pp.72-74.

(3) For this complaint see supra p.130

Vijñāneśvara says that he succeeds to such share only in the absence of daughters, ⁽¹⁾ clearly indicating thereby that the share which a mother obtains on partition devolves first upon her daughters according to the line of succession to strīdhana. Mādhava is more explicit on this point and says that such share devolves upon the daughters. ⁽²⁾

Aparārka specifically includes in strīdhana the wealth which a woman gains on partition in accordance with the verse of Yājñavalkya. ⁽³⁾ From the other authorities the Madanapārijāta of Viśveśvara Bhaṭṭa and the Vivādatāṇḍava of Kamalākara of the Benares school as well as the Mādhaviya and the Sarasvativilāsa of the Southern school adopt the sūtra of Gautama quoted in the Mitākṣarā in order to include within strīdhana property obtained by inheritance, partition etc. ⁽⁴⁾ Some of the other leading authorities which have not expressly included property obtained on partition are at least silent about the question. ⁽⁵⁾ In such case such property ought to have been declared to be strīdhana at least according to the law of the Benares school, the Southern school and of that part of the Bombay province which is governed by the Mitākṣarā in preference to the Mayūkha.

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- (1) Mit. on Yaj. 2.122. See also the explanation of the passage in the Subhodhini p.53 and the Bālabhaṭṭī p.153.
 (2) Pa.Ma. 340 - the provision in Yaj. 2.122 is accepted subject to the provision in the second part of Yaj. 2.117
 (3) Apa. on Yaj. 2.143.
 (4) Supra p.81.
 (5) See for instance V.Mi.440-42.

In the Calcutta High Court it has always been maintained that the share which a mother obtains under the Dāyabhāga law is to be considered as being given in lieu of maintenance and that after her death it reverts to the heirs of the original estate from which it was taken.⁽¹⁾

In Chhiddu v. Naubat⁽²⁾ their Lordships of the Allahabad High Court examined many authorities and came to the correct conclusion that the share which a mother obtains on partition is strīdhana and that on her death it devolves upon her own heirs.⁽³⁾

- (1) Sorolah v. Bhoobun (1888)15 Cal.292 F.B.; Hemangini v. Kedarnath (1889)16 Cal.P.C.758; Hridoy Kant v. Behari Lal (1906)11 C.W.N.239. In Sorolah's case their Lordships of the Full Bench considered the famous text about community of property between husband and wife as quoted in the Śrāddhāviveka (see supra p.47.) but, on the authority of Jagannātha, held that the wife's joint interest in husband's property ceases by 'the lapse of her husband's right' if a lineal heir in the male line survives him - 15 Cal.292 F.B. at 311. However, their Lordships appear to be aware of the 'incongruity' of the mother having only a life-estate in the partitioned property with a vested interest in the remainder remaining with the sons. In a Mitākṣarā case it was decided in Calcutta that though such property has been termed in the Mitākṣarā as woman's property the woman has 'no absolute power of disposition' over it - Beni v. Puran (1895) 23 Cal.262 at 279.
- (2) (1901)24 All.67.
- (3) Their Lordships referred to the practical illustration in the Mitākṣarā showing that a share obtained on partition is strīdhana - 24 All.67 at 76. Opinions of Sir Francis Macnaughten (1824 edi.p.43) and Sir William Macnaughten (3rd. edi.p.37) were not followed. Banerjee's opinion to the effect that according to the Mitākṣarā and the Mayūkha a share obtained on partition is strīdhana (2nd edi.p.305) and that a woman has the same right over such property as she has over inherited property, (2nd edi.p.330) was quoted with approval. - See 24 All.67 at 78. The above was the judgement of Aikman J. Banerji J. in a short judgement concurred with him but expressed, "The question is, however, beset with difficulties, and I must say, ... my mind is not free from doubt." - Report at p.81.

Their Lordships appear to have advanced the argument that if the share is by way of maintenance it is strīdhana but if it is by way of inheritance it cannot become strīdhana.⁽¹⁾ The reasoning seems to be sound as a widow would, by inheritance, take the whole property of her husband whereas she receives only a part of the property if it is divided in partition by her sons. Their Lordships accepted the view of the Calcutta High Court that such share is to be treated as being given in lieu of maintenance without accepting, however, the decision of that High Court to the effect that such share is not strīdhana.⁽²⁾

However, in Debi Mangal Prasad v. Mahadeo Prasad,⁽³⁾ which was a case under the Benares school of law, their Lordships of the Privy Council decided that immoveable property which a woman obtains on partition is not her strīdhana in the sense that it passes on, upon her death, to her own heirs, and that such property reverts to the next heirs of her husband. The ratio of this decision appears to be the assumption that property obtained by partition is on par with property obtained by a woman

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- (1) Ibid at p.75. It may be mentioned that according to Devaṇṇa only that much property should be given to the woman as would be sufficient for her maintenance - Smr.Cha.625. But Mādhava refutes such a suggestion saying that such an interpretation would violate the rule as expressed in the words 'equal share' appearing in Yājñavalkya's verse. - Pa.Ma.341.
- (2) Opinion of Trailokyanath Mitra (T.L.L.1879 p.467) to the effect that such share of a woman devolves upon 'her surviving heirs', was approved. The case was followed in Sri Pal Rai v. Raghunath (1901)24 All.82.
- (3) (1912)39 I.A.121.

by inheritance which, by their Lordships, had already been declared to be not strīdhana.⁽¹⁾

The ratio and the decision in Debi Mangal Prasad's case was later on followed by all the High Courts so that according to all the schools the property obtained by a woman on partition is not her strīdhana.⁽²⁾ It need hardly be emphasised that the decisions stating inherited property not to be strīdhana being themselves incorrect as regards the law of the Mitākṣarā school, the decisions as regards property obtained upon partition are much more so as they are in conflict with more direct and express texts of the same school.

It has already been noticed that gifts from relatives form some of the most important and usual categories of strīdhana. Gifts from the husband, however, stand upon a different footing from the rest in as much as the texts do not allow a woman to have

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- (1) See Smt. Kamala Devi v. Bachulal A.I.R. 1957 S.C. 434 at 440. However, in Bhugwande's case itself the question about share on partition appears to have been left open - see 11 M.I.A. 487 at 514.
- (2) Munilal v. Mt. Phula (1927) 50 All. 22 (the obiter dictum in this case is rather unintelligible); Bhagwantrao v. Punjaram I.L.R. 1938 Na. 255; Chamanlal v. Bai Parvati A.I.R. 1924 Bom. 151; Krishan Panda v. Jhora A.I.R. 1942 Pat. 429; Sital Prasad v. Sri Ram I.L.R. 1944 Luck. 450. See also Memon Adam v. Hakiani Bai (1922) 22 K.L.R. 165. In Chamanlal's case, however, it was decided on parity of reasoning that the widow under the Mayūkha has unrestricted right to dispose of moveables obtained by way of partition as well as by inheritance. It may incidentally be noted that though the share which a woman obtains in partition is not strīdhana, the amount ^{of} strīdhana which she has received already from the husband etc. is material in one respect viz. if it exceeds her share she gets nothing but if it is less she gets the balance in which she gains widow's interest - see Shamdas v. Savitribai A.I.R. 1937 Sind 181; see also Memon Andhremen v. Memon Osman (1908) 18 K.L.R. 195.

a right of free disposal over immoveable property given to her by her husband. Nārada says : "Whatever has been given to a woman by her husband out of affection, she can utilise or give away at her pleasure even after the death of the husband except immoveable property."⁽¹⁾ A text of Kātyāyana to which a reference has already been made⁽²⁾ has also been interpreted by their Lordships of the Privy Council as referring to gifts from the husband.⁽³⁾

It ought to be noted in the first place that whether such property is at the absolute disposal of the woman or not it will nevertheless be strīdhana according to all of the Mitākṣarā sub-schools as "to be at one's absolute disposal" is not regarded there as an essential ingredient of strīdhana. According to the Bengal school, however, such immoveable property cannot be strīdhana of the woman in as much as she cannot freely dispose of the same.⁽⁴⁾ In Madras, Bombay, and Allahabad immoveable property given to a woman by her husband has been regarded as her strīdhana though in some of the cases it was held that her power of disposition over such immoveables depended upon whether the husband has expressly

(1) Na.Smr.4.28. See the appendix text No.40.

(2), *Supra* p.118.

(3) Bhugwandeem v. Myna Bai (1867)11 M.I.A.487 at 511.

(4) See *Supra* p.109 for the definition of strīdhana as given in the Dāyabhāga.

conferred upon her the right to alienate such property.⁽¹⁾ The decisions in some of the cases, however, seem to lay down a general principle that simple words of gift in a document generally would not confer an absolute estate but only a limited estate which is equivalent to a widow's estate with a reverter of succession to the husband's heirs.⁽²⁾

In Bengal the question whether a property became strīdhana of a woman or not depended upon whether it was at her absolute disposal or not. The question whether a particular property would devolve like strīdhana or not naturally depended upon the construction of the deed of gift or will whereby the husband gave or bequeathed the property to his wife.

In Koonjbehari Dhur v. Premchand,⁽³⁾ notwithstanding the excellent argument of Banerjee to the contrary, their Lordships of the Calcutta High Court held that only simple words of transfer in a testamentary bequest would confer merely a limited

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- (1) Appeal No.174 of 1851 decided on 30th August 1865 by N.W.F.P. High Court referred to in Baboo Gunpat's case; Bagoo Gunpat v. Gunga Pershad N.W.P.H.C.R.(Pershad)(1867)p.30; Jeewun Panda v. Mt.Sona N.W.P.H.C.R.(1869)p.66; Kotarbasapa v. Chanverova (1873)10 B.H.C.R.403; Mulchand v. Badharsha v. Bai Mancha (1884)7 Bom.491; Bhujanga v. Ramayamma (1884) 7 Mad.387. In Mulchand's case and Jeewun Panda's case a testamentary bequest from the husband has been treated to be on the same footing as a gift inter vivos from the husband. The analogy has been followed in all the later cases on the same point.
- (2) For instance see Mohammad Shamsool v. Shewakram (1874)2 I.A. 7, wherein it was held that as a general rule women do not take an estate of inheritance under Hindu law and that the word 'malik' does not by itself confer an absolute estate on the female donee. But see Surajmani v. Ravi Nath (1907) 35 I.A.17.
- (3) (1880)5 Cal.684.

estate on the wife and that "it would be necessary for the husband to give her in express terms a heritable right or power of alienation" if he intends to confer upon her an absolute estate in such property.⁽¹⁾

But in Ram Narain v. Pearay Bhugat⁽²⁾ the same High Court refused to follow the dictum expressed in the above case and held that in order that a wife may take an absolute estate in immoveable property gifted to her by her husband it is not necessary that there should be such express terms in the grant as would convey an estate of inheritance.

The ratio of the earlier cases appears to be that women generally take only limited estate in any property whether inherited or obtained at a partition especially if it is immoveable property and that the same rule should be made applicable to immoveable property given to a woman by her husband unless the husband uses some express words which rebut this presumption of limited estate.⁽³⁾

(1) Banerjee pointed out the following things : that the words of gift used in the case of the widow and the daughter's son were the same, that the rule as to gift inter vivos should not be applied to gift by bequest in as much as there will be no purpose in making a will as the widow would gain limited interest in the property even without the help of the will and that the reason of the rule about husband's gift inter vivos is that the husband 'in fact reserves to himself a control over the property given'. Remarking that the position stated by them was 'a rule of law, well-established in this Court' their Lordships further observed that 'there can be no reason why such control should not be reserved to the male heir of the husband as well as to himself.' - Report at p.687. They also reasoned that the nature of the estate depends upon the capacity of taker in each particular case.

(2) (1883)9 Cal.830.

(3) But in Atul Krishna v. Sanyasi Churn (1905)32 Cal.1051 Harrington J. observed that such presumption applies not to all females but only to a childless widow.

The position soon changed when it was held that no distinction could be made between a gift to a man and a gift to a woman⁽¹⁾ and so the inferior status of a woman in this respect did not persist long. Accordingly it was decided by their Lordships of the Privy Council that such simple words like 'malik' would confer an absolute estate of inheritance on a woman unless there is something in the context which curtails her full proprietary rights.⁽²⁾ Similarly it has been held that words like 'generation after generation' used in a deed of gift have almost a technical meaning in India conveying a heritable and alienable estate; and it has been held that when on a true construction of the whole of the document it appears that an absolute estate has been conferred thereby, the right of alienation, though not stated in express terms, will be presumed to have been included.⁽³⁾

Thus it may reasonably be said that now property given by the husband does not, under the law of any school, form an

(1) See *Jatindra Mohun v. Ganendra Mohun* (1872)1 I.A.Sup.Vol.47 at 65; *Surajmani v. Rabinath* (1907)35 I.A.17 at 22; *Jagmohun v. Sri Nath* (1930)57 I.A.291 at 294. See also Mayne 11th ed. pp.869-70, 905.

(2) *Kollaney Looer v. Luchmee Pershad* (1875)24 W.R.395; *Lalit Mohun v. Chukkan Lal* (1897)24 I.A.76 at 88; *Surajmani v. Rabinath* (1907)35 I.A.17. The ratio was applied to both married women and widows - see 35 I.A.17 at 22. See also *Fatech Chand v. Rupchand* (1916)43 I.A.183; *Bhaidas v. Bai* (1921)49 I.A.1 at 6-7; *Sasisman v. Shib Narayan* (1921)49 I.A.1 at 6-7.

Addition to p.168 note 3 :

The mere fact that the grant was made for the support or maintenance of the female donee does not mean that she gained only a limited estate therefrom - *Ram Gopal v. Nand Lal* A.I.R.1951 S.C.139. But see *Kshetra Sahu v. Syama Sahu* A.I.R.1958 Ori.254.

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(3) *Jagmohun v. Sri Nath* (1930)57 I.A.291. [*Narsingh Rao v. Lakshmayya v. Tirupathamma* A.I.R.1959 And.Pra. 710.]

(continued)

exception to the general rule that gifted property is strīdhana unless a limited interest is specifically indicated by the donor.

Gifts from strangers form an exception, according to Kātyāyana,⁽¹⁾ to the usual rule that gifts constitute strīdhana. But in the Courts it has always been accepted unhesitatingly that such property is strīdhana of the female donee. In Brij Indar v. Janki Koer⁽²⁾ it was decided by their Lordships of the Privy Council that property which is granted by the government to a widow and her heirs with full power of alienation becomes her strīdhana and devolves upon her heirs. Despite the arguments of Mayne and Cowell to the contrary, Sir Barnes Peacock approved the definition of the Mitākṣarā⁽³⁾ which was 'the

Mahalakshmi (1928)55 I.A.180 was a peculiar case in which a testator had bequeathed his estate absolutely to his widow subject only to the ulterior disposition in favour of his son's son who was unborn at the time of his death. Their Lordships of the P.C. held that gift to unborn person being void the widow took an absolute interest as according to sections 28 and 30 of the T.P. Act invalidity of an ulterior disposition does not affect the prior disposition. In Basant Kumari v. Kamikshya (1905)33 Cal. 23 (gift to a sister) it was held that words of inheritance stating even an unusual order of succession would confer an absolute estate. But for a conditional gift to the contrary see Sham Shivender v. Janki (1908)36 I.A.1.

(1) Supra p.74.

(2) (1877)5 I.A.1.

(3) Supra pp.77-78.

ordinary law⁽¹⁾ applicable to this case and held that the property was strīdhana. However, Mayne and Cowell do not appear to have drawn the attention of their Lordships to the verse of Kātyāyana.

Similarly lands which are enfranchised in the name of a widow as service inam or emoluments for the office of a karnam have been held to be her absolute property and they devolve as strīdhana after the death of the woman concerned.⁽²⁾

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- (1) Under the Oudh Estates Act I of 1869 s.22 clause 11 'ordinary law' would have governed the succession in this case. The ordinary law in this case was held to be the Mitākṣarā - see report at p.14. About the interpretation of the word 'ādya' in Yājñavalkya's verse Sir Barnes observed "It was stated in the course of the arguments by the learned counsel for Shankar Bux that proper translation is 'and the like' or 'and such like'. It does not appear to their Lordships to be important whether this is so or not. The learned counsel may be correct. But the words 'and the like' or 'and such like' would shew that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to." - 5 I.A.1 at 14. But see Chotay Lall's case (6 I.A.15 at 31)
- (2) Srinivasayyar v. Lakshamma (1883)7 Mad.206; Bada v. Hassu (1883)7 Mad.236; Venkata v. Rama (1884)8 Mad.250 F.B.; Venkatarayunda v. Venkataramayya (1891)15 Mad.284; Dharnipragada v. Kadambari (1897)21 Mad.47; Salemma v. Lautchmanna (1897)21 Mad.100; Subbaraya v. Kamu Chetti (1900)23 Mad.47; Venkata Jagannadha v. Veerabhadrayya (1921)44 Mad.643 P.C. The ratio of all these cases was that the land thus enfranchised becomes the personal property of the person to whom they are granted. For the law about enfranchised lands see Madras Act IV of 1866 and Madras Act VIII of 1869 referred to in Pingala's case (infra). In Venkata v. Rama the Madras Regulations of 1802, 1806 and 1831 were considered. The text of Kātyāyana was considered only in Salemma's case wherein, pointing out the significant fact that Vijñāneśvara does not refer to this text at all, Subramania Ayyar J. held that the broad definition in the Mitākṣarā must be preferred especially as Devaṇṇa and Mādhava do not express any opinion on this point.

Some of the decisions of the Madras High Court distinguished between a personal inam and a service inam and tried to establish that a title-deed does not confer a new and an absolute right in the enfranchised lands.⁽¹⁾ It is strange to find that a later decision of the Madras High Court has not followed the ratio of a previous Full Bench decision of the same High Court in this respect.⁽²⁾ In Venkata Jagannadha v. Veerabhadrayya,⁽³⁾ however, their Lordships of the Privy Council set this conflict at rest by overruling this later Full Bench decisions and held that such service inam do in fact form the personal property of the person in whose name they are granted and that no other member of the family of the karnam has any right in the same.

In all the above cases the gift or the grant proceeded from the government. But it has always been held that gifts also from strangers who are private persons constitute strīdhana of

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- (1) Subba v. Nagayya (1901)25 Mad.424; Gunnaiyan v. Kamakchi (1903)26 Mad.339; Vangla v. Vangla (1904)28 Mad.13; Pingala v. Bomireddipalli (1906)30 Mad.434 F.B.; In Vangala's case the decision in Subba v. Nagayya appears to have been unnecessarily distinguished. In a foot-note to the former it has incorrectly been added that the latter is an unreported case.
- (2) In Pingala's case (supra) their Lordships of the Full Bench expressed that it was difficult to find any definite principle common to the majority of the judges in the previous Full Bench case of Venkata v. Rama (supra).
- (3) (1921)44 Mad.643. See *ibid* at p.653 where their Lordships of the P.C. have described^{as} 'full of perplexity' the whole procedure whereby the later Full Bench of Madras High Court declined to follow the decision of a previous Full Bench of the same High Court. See also *supra* p.31.

the female donee.⁽¹⁾ It must be mentioned that the position of the judicial law on this point is contrary to the śāstric law.

Though the widow and other limited owners cannot take an absolute interest in the inherited property their absolute right in the income of such property has never been doubted. But the question whether an accumulation of such income is to be regarded as strīdhana or not has not always received a uniform answer and it is submitted that even the decisions of their Lordships of the Privy Council have not been consistent on this point.

The oldest case appears to be Soorjeemoney v. Denobundo⁽²⁾ wherein one Bustomdoss Mullick had devised his estate in equal shares to his five sons who stayed together as a joint family under the Dāyabhāga school. He had provided in his will that on the death of any of the sons the property should go to the surviving heirs and not to the heirs of such deceased son. One of the sons Saroopchunder died and his widow claimed his one-fifth share on the ground that he gained an absolute interest therein. Their Lordships of the Calcutta High Court decided that as Saroopchunder secured an absolute interest the widow was entitled to a one-fifth part in the joint estate, to the accumulations on such one-fifth part which accrued during the lifetime of Saroopchunder and to

(1) Bai Narmada v. Bhagwantrao (1888)12 Bom.505; Parvin Kumari v. Gokul Chand A.I.R.(1949) East Punjab 35.

(2) (1862)9 M.I.A.123. For the facts and details of this case see Soorjeemoney v. Denobundoo (1857)6 M.I.A.526 at 529-32.

'the interest and other profits' which accrued to these accumulations after the death of Saroopchunder.⁽¹⁾ They gave her only a limited interest in all this property. When the case came before their Lordships of the Privy Council it was decided that as Saroopchunder secured only a life-interest in the property the widow was entitled only to the accumulations which accrued to his share during his lifetime. But then it was added, " ... it ought to be declared that the Appellant is entitled absolutely in her own right to all such interest and accumulations as, since the death of Saroopchunder Mullick, has or have arisen from the one-fifth part of the accumulations to which she is before declared to have been entitled."⁽²⁾

Since the absolute right of the widow in these accumulations was neither claimed in the plaint⁽³⁾ nor pressed before their Lordships by the appellant's counsel the decision on this point appears to be somewhat sudden. Moreover although the widow has deposed that "she was excluded against her will from the family house",⁽⁴⁾ this fact does not appear to have been the basis of their Lordships' decision on this point.

(1) This being a case under the Dāyabhāga school once it was held that the will conferred absolute interest on Saroopchunder the widow became automatically entitled to claim his share by inheritance notwithstanding the clause in the will which made defeasible the interest of the son.

(2) 9 M.I.A.123 at pp.138-39.

(3) For the plaint see 6 M.I.A.526 supra.

(4) 9 M.I.A.123 at 126.

Even after this decision of their Lordships of the Privy Council some of the decisions of the Calcutta High Court and a decision the Privy Council itself appear to have distinguished between the yearly income of the estate and its accumulations,⁽¹⁾ and the view expressed was that the widow could not have an absolute right in the accumulations or at least in the property purchased out of such accumulations. In Bhagbutti v. Bholanath, Sir Robert Collier observed that "Whatever she purchased out of them would be an increment to her husband's estate."⁽²⁾

But since the decision of the Calcutta High Court in Pannalal v. Bamasundari⁽³⁾ the authority and the ratio of Soorjamoney's case was followed and it was never doubted that a widow could, if she had an intention to do so, convert the accumulations

- (1) In Kailasnath Ghose v. Biswanath reported in the Englishman of the 2nd July 1859 (referred to and reprinted at the bottom of the report of Grose v. Amritamayi (1869) 4 B.L.R.1 at 42) Sir Lawrence Peel remarked "Money in hand and accumulations are not the same thing." In Chandrabullee v. Mr. Brody (1868) 9 W.R.584 it was held that as accumulations were not mentioned in the six categories referred to by Jīmūtavāhana and as the widow is "most strictly enjoined to live a life of economy, austerity and seclusion" such accumulations can never be strīdhana. In Grose v. Amritamayi 4 B.L.R.1 at 40 Macpherson J. observed that accumulations are to be treated as corpus only and referred to the above-mentioned remark of Sir Lawrence as his authority. The same view was adopted by their Lordships of the P.C. in Bhagbutti v. Bholanath (1875) 2 I.A.256.
- (2) 2 I.A.256 supra at 260-61.
- (3) (1871) 6 B.L.R.732; Gonda Kooer v. Kooer Oodey Singh (1874) 4 B.L.R. 159 P.C.; Puddo Monee v. Dwarkanath (1876) 25 W.R.335., Isri Dutt v. Hansbutti (1883) 10 Cal.325 P.C. This point has been accepted in all the decisions mentioned hereafter. But see Kulachandra v. Bamasundari (1914) 41 Cal.870 at 874.

and the purchases made out of them into her own absolute property devolving upon her own heirs as strIdhana.

In Isri Dutt v. Hansbutti⁽¹⁾ their Lordships of the Privy Council observed that it is not "possible to lay down any sharp definition of the line which separates accretion to the husband's estate from the income held in suspense in the hands of the widow, as to which she has not determined whether or not she will spend it."⁽²⁾ The question was then decided on the facts as depending on the intention of the widow whether to treat the property as an accretion or not.⁽³⁾

But the question as to what the presumption should be in case there is no evidence about the widow's intention, appears to be beset with difficulties. It has, however, been held that where a female limited owner acquires a life-estate under a written document like a gift-deed or a will, the proceeds of the estate will be the absolute property of the woman and would

(1) Supra 10 Cal.325 P.C.

(2) Ibid at p.337.

(3) The two co-widows in this case had gifted to the daughter of one of them property which they had inherited from their husband and the purchases which they had made afterwards out of the accumulations of the income. On the basis that the property was purchased immediately after the death, that it was not alienated for a long time and that both inherited and purchased property was alienated with an intention to change the line of succession from the husband's heirs to the widow's heirs, their Lordships of the P.C. held that clear intention of accretion was established. Similar reasoning was adopted in Sheolochun Singh v. Saheb Singh (1887)14 Cal.387 P.C.; Kulachandra v. Bamasundari (1914) 41 Cal.870.

devolve on her strīdhana heirs.⁽¹⁾

It has also always been held unanimously by all the High Courts that in a case where a female limited owner has been wrongfully withheld from possessing the estate or the accumulations, the presumption would be in favour of such accumulations being treated as absolute property devolving as strīdhana.⁽²⁾ The distinction was created by following the supposed ratio of Soorjee-money's case to the effect that the widow in that case was declared to be entitled absolutely to the accumulations only because she was withheld from possession of the estate.

As regards the presumption to be accepted in a case where the limited owner has been in possession of property but wherein there has been no evidence as to the intention of the owner whether to treat it as an accretion or not there are two views. According to the first and relatively the older view if

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- (1) Bhugbutti v. Bholanath (1875)2 I.A.256; Bohini Mohun v. Rashbehari Ghose A.I.R.(1937)Cal.229. In the latter case it was observed, "there was a separation of the income from the estate from the very start and she could not possibly express any intention to treat the income or the savings as part of the estate."
- (2) Soorjee-money v. Denobundoo (1862)9 M.I.A.123 as followed in Pannalal v. Bamasundari (1871)6 B.L.R.732; Saudamini v. Administrator General of Bengal (1893)20 I.A.12; Subramania v. Arunadhelam (1905)28 Mad.1 F.B.; Venkatadri v. Parthasarathi (1925)48 Mad.312; Ayiswaryanandaji v. Sivaji (1926) 49 Mad.116 at 135-6 and 150. However, the decisions of the Madras High Court appear to have been based on a broader ground, namely, in absence of any evidence about the intention of the widow the property should be treated as strīdhana - see infra.

the female who is ^a limited owner has not shown any specific intention to keep the accumulations or the property purchased therefrom as her separate property, they should prima facie be considered as an accretion to the corpus of the property which she inherited. ⁽¹⁾

According to the second and relatively a better view the presumption, in the absence of any evidence about the intention of the limited owner, should be in favour of such property being regarded as stridhana. ⁽²⁾

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- (1) The view has its root in *Gonda Kooer v. Kooer Oodey Singh* (1874) 4 B.L.R. 159 P.C. at 165. In this case their Lordships of the P.C. distinguished *Soorjeemoney's* case on the grounds that it was a Bengal case and that "the accumulations of income to which the widow was declared absolutely entitled were the produce of a reserve fund." - Report at pp. 164-65. See also *Sheolochun v. Saheb Singh* (1887) 14 Cal. 387 P.C.; *Kula Chandra v. Bama Sundari* (1914) 41 Cal. 870; *Naba Kishore v. Upendra Kishore* A.I.R. 1922 39 P.C.; *Krishna Kumari v. Rajendra* A.I.R. 1927 Oudh 240; *Bhugwan Das v. Bittan* I.L.R. 1945 All. 148.
- (2) *Akkanna v. Venkayya* (1901) 25 Mad. 351; *Subramania v. Arunachelam* (1905) 28 Mad. 1 F.B.; *Venkatadri v. Parthasarathi* (1925) 48 Mad. 312 P.C. at 324; *Ayiswaryanandaji v. Sivaji* (1925) 49 Mad. 116 at 150-51; *Kailasanatha v. Parasakthi* (1934) 58 Mad. 488 at 507; *Rupabai v. Nokhesing* A.I.R. 1940 Nag. 236; *Prabhakar v. Sarubai* A.I.R. 1943 Nag. 253; *Lalsingh v. Vithal-singh* A.I.R. 1950 Nag. 62; *Ganu v. Shriram* A.I.R. 1954 Nag. 353. See also *Sankarmurthia v. Oppanayana* (1905) 21 T.L.R. 56; *Lal Bahadur v. Sheo Narain* (1913) 16 Oudh Cases 359. In *Keshav v. Maruti* (1921) 46 Bom. 37 the Bombay High Court appears to have adopted the view as expressed in *Akkanna's* case. In many of these cases it has been pointed out that even the decisions of their Lordships of the Privy Council have not been uniform on this point. - See supra 28 Mad. 1 F.B. at 5; 49 Mad. 116 at 151; 58 Mad. 488 at 497-505. In *Venkatadri's* case the female limited owner was not in possession of the property but that does not appear to be the ratio of the decision of their Lordships - see the discussion in *Kailasanath's* case 58 Mad. 488. For a similar view as regards

In a recent case⁽¹⁾ the Supreme Court does not appear to have clearly solved this problem. Their Lordships confirmed the previous position, namely, that each question is to be decided on its own facts and that the decision depends upon the intention of the widow. The accumulations were treated as the absolute property of the widow in this case as a definite intention on her part was proved. But holding that there is no presumption that accumulations are accretion to the corpus their Lordships observed : "As the reversioners can only claim the property which belonged to the propositus, the burden is on the plaintiff to establish that these properties formed the part of Naubat Lal's estate."⁽²⁾

Thus the opinion of their Lordships of the Supreme Court appears to be leaning towards the second view. The second view is obviously a more reasonable, progressive and an equitable view; for, presumptions must after all be based on general experience : every acquirer of property has an intention to retain dominion over it⁽³⁾ and a widow who cannot be an exception to the rule will have an intention in 99 out of 100 cases to keep

property purchased with the income out of the estate given for maintenance see *Ram Das v. Ram Sevak* A.I.R.1935 Nag.362. See also *Dakhina v. Jagadishwar* (1897)2 C.W.N.197 for presumption in favour of stridhana in cases there is no evidence that the property is bought out of the income of the husband's estate.

(1) *Sitaji v. Bijendra* A.I.R.1954 S.C.601.

(2) *Ibid* at p.605.

(3) See *Akkanna v. Venkayya* supra for a remark to this effect.

it separate.⁽¹⁾ Moreover it cannot be forgotten that the first view of the presumption is based on ^{an} erroneous interpretation of śāstra that women do not take absolute estate in the property which they inherit.

The next point to be considered is whether property acquired by a woman by adverse possession is her strīdhana. It should be stated at the outset that adverse possession was known to the Hindu lawyers since the days of the smṛitis.⁽²⁾ According to Yājñavalkya a person can acquire absolute title in immoveable and moveable property by adverse possession of that property for twenty and ten years respectively.⁽³⁾ There appears to be no text of the smṛitis which distinguishes between the male's and female's capacity to acquire property by adverse possession.⁽⁴⁾ As according to the current statutory law of India, so according to the old śāstric law, the neglect of the rightful owner to challenge

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- (1) See 28 Mad.1 F.B. supra at 5. In a recent case *Velu Servai v. Srinivasa M.L.J.* (1956) II.60 the Madras High Court held that the construction of a house by a widow with her own funds on a vacant site forming a part of her husband's estate will not by itself prove accretion.
- (2) However, adverse possession (bhoga) is different from seizure (parigraha) mentioned by Gautama as one of the modes of acquisition. Seizure is taking possession of property which did not belong to anybody before - see Haradatta's *Mitākṣarā* on Gau.10.38 and *Mit.* on Yaj.2.114. For misunderstanding between the two see *infra* p.194.
- (3) Yaj.2.24. Vijñāneśvara adds that adverse possession, though not mentioned by Gautama, is one of the modes of acquiring property as these modes themselves depend on popular usage. - *Nir.Edi.p.*136.
- (4) But Hindu law does not allow adverse possession to be claimed against the property of the Crown, minors and women. - Yaj.2.25. Vijñāneśvara says that in all these cases there is some reason for the neglect of the rightful owner e.g. the King is too busy to take any objection and women are dull and ignorant.

the wrongful possession of the trespasser forms the basis of the acquirement of title by adverse possession.⁽¹⁾ The decided cases, however, are based upon the modern law and not upon the concept as enunciated in Hindu law.

The question of woman's acquisition by adverse possession has proved to be a very intricate point upon which the decisions of the Courts in India have widely differed. Therefore it is necessary to examine individually the older decisions of their Lordships of the Privy Council.

In Lachhan Kunwar v. Manorath Ram⁽²⁾ which appears to be the oldest case on the question whether ^{or not} such property is strīdhana, their Lordships of the Privy Council held that the question is to be decided on the individual facts, and that it turns upon whether she claimed the property absolutely or claimed merely a widow's estate in the same. In this case, however, as the widow had claimed her husband's property despite the existence of the son it was held that she claimed an absolute interest and acquired the property absolutely by adverse possession.⁽³⁾

In Mahabir Prasad v. Adhikari⁽⁴⁾ it was held by their Lordships that where a widow of a sole surviving coparcerner gifted away the property to the other two widows of the family

(1) See Mit. on Yaj.2124 at p.136. See also (upekṣā) stated in the above passage of the Mitākṣarā. Vijñāneśvara also says that the statement of the usurper, viz. : "If I have enjoyed the property of this person wrongfully why was this person quiet for such a long time?" would make the original owner dumbfound.

(2) (1894)22 Cal.445 P.C.

(3) The view of the Judicial Commissioner that she actually treated the property as her absolute property was accepted - 22 Cal.445 P.C.at 450.

(4) (1896)23 Cal.942 P.C.

the latter acquired an absolute interest after the period of limitation. The question about the intention of these widows was not discussed at all.

In Sham Koer v. Dahkoer⁽¹⁾ their Lordships held that where a widow who is not entitled to anything except maintenance from a joint family property takes possession of such property in her own right, she gains an absolute interest after the statutory period.⁽²⁾ The fact that a widowed daughter-in-law claimed the property under an alleged will was held sufficient to confer an absolute estate on her.

In Satgur Prasad v. Raj Kishore⁽³⁾ wherein a widow had come into possession of a joint family property as her husband's heir it was held that the widow gained an absolute interest in the property on account of her subsequent attitude of publicly claiming the property in her own right.⁽⁴⁾

(1) (1902)29 Cal.664 P.C.

(2) In this case the joint family property of a sole surviving coparcener was taken possession of by his widow and widowed daughter-in-law in 1862. In 1876 in a suit between the widows and the reversioners the widows claimed the property under a will from the propositus. The H.C. decided that the widows could not be disturbed during their life-time. After the death of the widow in 1879 the daughter-in-law alienated the property in 1884. Held, that as the widows had claimed under the will, whether that position is tenable or not, the daughter-in-law acquired absolute title as her possession was adverse especially after the death of the widowed mother-in-law.

(3) (1919)42 All.152 P.C.

(4) Her brother-in-law had died as the last surviving coparcener. She got into possession in 1861 as her husband's heir. In 1870 in a suit before the H.C. she claimed the property as her husband's heir and alternatively under a document purporting to give her that property for her maintenance. After having gifted the property in 1880 she died in 1895.

Lajwanti v. Safa Chand⁽¹⁾ is the next and perhaps the most important case on this point. The facts of this case were as follows : One Jawahar Mal died and in 1869 in the litigation which followed Jawahar's death his widows were held by their Lordships of the Punjab Chief Court to be entitled to the widow's estate in certain villages which formed his separate property. After the death of the last widow in 1910 the plaintiff claimed as a daughter of Jawahar whereas the defendants who were his male agnates sought to prove for the first time that he had a posthumous son and claimed through him or alternatively they claimed that the last widow took the property as strīdhana and that they were heirs preferable to the plaintiff.⁽²⁾

As regards the first claim of the defendants their Lordships of the Privy Council reversed the decree of the High Court and held that a posthumous son was in fact born to Jawahar but that his right was barred by the adverse possession of the widows. As regards the alternative claim they observed : "The Hindu widow, as often pointed out, is not a life-rentor, but has a widow's estate - that is to say, a widow's estate in her deceased husband's

(1) (1924)51 I.A.171.

(2) The third widow survived the other two. The daughter was by the second widow whereas the posthumous son whose existence was totally disbelieved by the H.C. was by the first widow of Jawahar. It appears that even admitting that the property was strīdhana of the third widow the plaintiff would have succeeded in preference to the defendants as a step-daughter is to be preferred to the collaterals of the husband. - See infra

Addition to p.182 note 1 : See Dr.J.D.M.Derrett : A strange Privy Council decision and the Hindu Widows' Remarriage Act 1856, A.I.R. Journal (1955) pp.10-20.

estate. If possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as strīdhana, but she makes them good to her husband's estate."⁽¹⁾

It is important to note that the widows enjoyed a widow's estate throughout their life under the decree of the High Court⁽²⁾ and the point about the posthumous son was raised for the first time after the death of all the widows who, during their life-time, could never have claimed any other title except a widow's estate. Their Lordships of the Privy Council had to hold the possession of the widows to be adverse as they believed that a posthumous son did in fact exist and held that the judgement of the High Court which had conferred widow's estate on them was wrong.

In three of the above-mentioned cases there was evidence, according to their Lordships of the Privy Council, that the female limited owners tried to establish an absolute title. In Lajwanti's case, however, the widows had claimed, fought for and gained only a widow's estate and there could be no intention on their part to treat the property as strīdhana. It is also important to note that in Satgur Prasad's case the widow, though she originally claimed only as her husband's heir, was held to have prescribed for an absolute estate because of her subsequent attitude of

(1) 51 I.A.171 at 176.

(2) The decree was given against the nephew of Jawahar Mal who tried to establish his alleged adoption to Jawahar Mal.

treating the property as her absolute property.⁽¹⁾

But when there is no evidence as to the nature of interest which the widow wanted to prescribe for, the question whether such property should be treated as her absolute property or not, cannot be easily decided and the decisions under this head can be grouped into two main views which are diametrically opposed to each other.

According to the first view where a widow enters into possession of any property over which she has no claims except for her maintenance⁽²⁾ and there is no evidence about the intention of the widow as to the nature of the estate she wanted to prescribe, the presumption is in favour of such property being treated as her absolute property unless the possession was the result of an arrangement with the reversioners. The fact that she claims an interest by alleged right of inheritance does not affect this presumption unless the widow expressly limits her claim.⁽³⁾

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- (1) See supra. The difficulty of interpreting these decisions is increased by the fact that none of them considers the judicial precedents on the same point.
 - (2) Such property may include the joint family property of the family to which the female belongs or the separate property of any of her male relatives which she is not entitled to as an heir.
 - (3) Uman Shankar (1923)45 All.729; Kali Churn v. Piari (1924) 46 All.769; Rikhadeo v. Sukhdeo (1927)49 All.713; Sant Bakhsh Singh v. Bhagwan Baksh Singh A.I.R.1931 Oudh 25; Mt. Hubraji v. Chandrabuli A.I.R.1931 Oudh 89; Mathakutty v. Lakshmi (1931)48 T.L.R.18; Bhogilal v. Ratilal A.I.R.1939 Bom.261; Ram Sarup Singh v. Mohun Singh I.L.R.1939 All.713; Patipal Singh v. Rampal Singh A.I.R.1940 Oudh 63; Udai

(Continued)

Pratap Singh v. Marotam Singh I.L.R.1946 Luck 143; Suraj Balli v. Tilakdhari (1927)7 Pat.163; Ulfat Rai v. Kamla Devi A.I.R.1949 All.458; Bheron Singh v. Ramchandra A.I.R. 1957 M.B.138; Thailambal Ammal v. Kesavan Nair A.I.R.1957 Kerala 86 at 90. Only Uman Shankar's case has been decided before Lajwanti's case. Udai Pratap's case has approved the following precedents of the same Court viz. Raj Bahadur v. Kandhaiya 4 O.W.N.350; Deo Dutt v. Raj Bali 5 O.W.N.653; Ram Dulari v. Sher Bahadur 5 O.W.N.832; Abdur Rahman v. Ahmadkhan 10 O.W.N.42. Suraj Balli's case has followed Jagmohan v. Prayag (1925)P.L.T.206. The common ratio of all these decisions is that in the absence of any evidence about the way in which the widow claimed such property or got into possession, such property is to be treated as being strīdhana. However, according to Ram Sarup's case the presumption is in favour of absolute estate unless she claims it by way of succession to the husband or son. In Suraj Balli's case wherein a widow had taken possession of the property of her brother-in-law such presumption was held to exist unless it were shown that she took possession 'as representing her husband's estate'. But the decisions in Uman Shankar v. Mt. Aisha and Udai Pratap v. Narotam favour the view that even if the widow enters into possession claiming it as an heir, the presumption is not affected. Ulfat Rai's case also appears to favour the same view. In other cases it is not stated whether such claim of inheritance shows an intention of restricting the claim only to a widow's estate. But most of the cases tend to take the view taken in Uman Shankar's case. In Kali Charan v. Piari their Lordships of the All.H.C. distinguished Lajwanti's case and observed : "There have been recent and conspicuous instances of the danger of applying Privy Council decisions to points which they did not decide but which, in the language of Lord Halsbury, may seem to flow from them" 46 All.769 at 772. Where a widow had taken possession of joint family property their Lordships of the Bom.H.C. observed : "Moreover it seems unreasonable to assume that Bai Suraj who inherited no estate from her husband could benefit by her individual act an estate she did not represent on the principle stated in 26 Bom.L.R.1179" (i.e. Lajwanti's case). - A.I.R.1939 Bom.261 supra. In Udai Pratap's case it was observed : "The mere fact that a Hindu widow declares that she is in possession of such property by way of inheritance does not show that she declares herself to be in possession as a limited owner. The real view in such a case would be that she not being entitled to by way of inheritance, her possession must be deemed to be that of a trespasser and consequently adverse

(continued)

According to the second view if a widow, who is not entitled to any joint family property or to the property of a relative (to whom she is not an heir), takes possession of such property claiming it by way of inheritance she gains by adverse possession only widow's estate in such property.⁽¹⁾ This view

against the reversioners, unless they prove that it was with their consent." In Ulfat Rai's case Mushtaq Ahmad J. enunciated five points the last two of which are as follows : "That the question of widow's possession as a limited owner can arise only if she claims through the last male owner, that is to say if she is his heir and not otherwise."; and "That a fortiori if she is not the heir of the last male owner, her possession is adverse to the latter's heirs, and after the lapse of 12 years the property becomes her stridhan, descendible on her own heirs." - A.I.R.1949 All. 458 at 462. However, in a later case the same learned judge "feeling somewhat doubtful about the correctness of his decision" in Ulfat Rai's case referred the case to a divisional bench which ultimately followed the second view - see Jamuna Pandey v. Bansdeo Pandey A.I.R.1958 All.739. It is distressing to find that instead of referring any case on this point to the Full Bench their Lordships of the Allahabad High Court have remained content with oscillating capriciously between the two views - see the cases below. Litigation on this point, therefore, must be considered to have been merely speculative in United Province since the decision in Dungar Singh v. Mt. Maid Kunwar A.I.R.1933 All.822. The presumption does not exist where the possession of the female is proved to be permissive or to be the outcome of a family arrangement - see supra A.I.R.1931 Oudh 25; A.I.R.1931 Oudh 83 at 96; A.I.R.1949 All.458 at 462.

- (1) Dungar Singh v. Mt. Maid Kunwar A.I.R.1933 All.822; Gaya Din v. Badri Singh I.L.R.1943 All.230; Chandrabali v. Bhagwan I.L.R.1944 All.533; Virabhadrapa v. Virabhadrapa A.I.R.1947 Bom.1; Maganlalji v. Purshottamlalji A.I.R.1949 Bom.80; Gaya Din v. Mt. Amrauti A.I.R.1955 All.630; Gunderao v. Venkamma A.I.R.1955 Hyd.3 F.B.; Jamuna Pandey v. Bansdeo Pandey A.I.R.1958 All.739. The second view started with Dungar Singh's case which has been followed in almost all the later cases of this set. It must be stated that this case does not appear to have been rightly decided. In the first place, their Lordships have not noticed the contrary decision of their own High Court viz. Uman Shankar's case

is in fact based on the doctrine that women generally take limited estate in heritance and such other property. (1)

the ratio of which has been followed in the first set of cases. Secondly, the widow in this case, unlike the widow in Lajwanti's case, was alive and had executed several mortgage bonds before the one which was considered in this case. This clearly showed that she treated the suit-property as her absolute property and following Satgur Prasad's case it ought to have been held that she prescribed for an absolute estate notwithstanding her claim by way of inheritance. The later cases simply adopt the ratio of Dungar Singh's case, namely, where there is a claim by way of inheritance only limited estate is presumed to have been gained by the female "unless she specifically states that she claims an interest which a Hindu woman cannot acquire by inheritance under Hindu law." - I.L.R.1943 All.230 at 236. The Hyderabad Full Bench decision has been given only by a majority of 3 to 2. In Virabhadrapa's case their Lordships of the Bombay High Court have given a self-contradictory decision. In this case a widow had taken possession of the joint family property of her father-in-law and it was held that as against the other joint members she had acquired title by adverse possession but that her title was a "title of the widow of a deceased separated member of the family" and that it went by succession to the heirs of the son who was adopted to her husband. The decision is highly illogical in as much as it involves a fiction that the widow carved out from the joint family property an absolute interest in favour of her husband and then carved out for herself a widow's estate from such interest leaving the rest for the benefit of the reversioners of the husband. It must be submitted that if a widow in such a position is held to have prescribed for a limited estate the property must go back into the joint family property after her death, or, if she is held to have prescribed for an absolute estate the property must be held to devolve upon her own heirs and not upon the heirs of the husband. Their Lordships could not possibly hold that the

p.187: In Mst. Kirpal Kuar v. Bachan Singh (1958) S.C.J.439 their Lordships of the Supreme Court held that the possession of the widow of a predeceased son which is not proved to have been under any arrangement with the heirs of the deceased or under a claim as the heir of the deceased, must be taken to be adverse to the reversioners.

stated above.

- (1) See Thailambal Ammal v. Kesavan Nair A.I.R.1957 Kerala 85 at 90.

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(1) See *Thailambal Ammal v. Kesavan Nair* A.I.R.1957 Kerala 85 at 90.

It is submitted that looking to the facts of Lajwanti's case the decision of their Lordships of the Privy Council does not appear to support the second view at all. The widows in that case were entitled to such possession as heirs under the decree of the High Court and throughout their lives they owned the property under a legal title of heirship. It was only long after their death that a birth of a posthumous son was proved which automatically attributed ~~an~~ incorrectness to the decision of the High Court and changed the nature of their possession. On the other hand in all the cases coming under the second set the female owners were not entitled to possession of the property at all. They might have claimed the property, in some cases, by way of inheritance but that is altogetherly a different thing; for in a claim by adverse possession the ostensible title of a usurper has nothing to do with the title acquired by adverse possession unless the ostensible title is a result of force, fraud etc. For instance a person who is in wrongful possession of a particular property under an alleged claim that the property was gifted over to him by the rightful owner, shall acquire an absolute interest in it after the statutory period irrespective of the fact whether the deed of gift was void or not. His title would be perfect and absolute after the statutory period even if he had no title or a defective title under the deed of gift.⁽¹⁾ There is no reason

(1) See Varatha Pillai v. Jeevarathnammal (1920)46 I.A.285 and Mt.Maluka v. Pateswar A.I.R.1926 Oudh 371 F.B. in which the females had entered into possession under an alleged oral gift of immoveable property. It was held that the deeds of gifts were void but that ^{the} presumption conferred on the females absolute title in the property which devolved upon their heirs.

therefore why a female who apparently claims certain property by way of inheritance but becomes entitled to it by adverse possession should be considered as having gained only that much interest in the property which she would have gained if she had become entitled to that property by way of inheritance.⁽¹⁾

It has already been seen that Kātyāyana's provision as regards gifts from strangers has been disregarded by the Courts and that such property has always been considered as being strīdhana.⁽²⁾ The other category of woman's property which has been declared by Kātyāyana to be not strīdhana, namely, property acquired by a woman by labour or skill, has also been accepted by the Courts as being strīdhana.⁽³⁾ So also the wife's interest in the property jointly acquired in trade by husband and wife is strīdhana.⁽⁴⁾ Similarly the absolute property of a prostitute

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- (1) For possession ceasing to be adverse before the completion of the statutory period see *Varatha Pillai v. Jeevarathnammal* (1920)46 I.A.285; *Dhurjati v. Ram Bharos* (1929)52 All. 222. For res Judicata on this point see *Bansidhar v. Dulhatia* (1925)47 All.505.
- (2) *Supra* pp.169-172.
- (3) *Bai Narmada v. Bhagwantrao* (1818)12 Bom.505; *Sunder Devi v. Thaboo Lal* A.I.R.1957 All.215; *Mumumma v. Krishna* A.I.R. 1933 Rang.347; *Madaswami v. Madhavan* T.L.R.(1947)822; *Naji v. Kaliani* (1889)12 Mys.L.R.54 (property acquired by a maiden).
- (4) *Muthu Ramakrishna v. Marimuthu* (1915)38 Mad.1036. The Court following *Salemma's* case (21 Mad.100 *supra*) held that a woman can acquire property by any mode which is open to a male. Reliance was placed on the authority of Mayr who adduces many passages in the Vedas which show that in those days women pursued independent occupations and acquired property thereby. - Report at p.1039. Kātyāyana's text was referred to but the opinion of Mitra Miśra, namely, such property is strīdhana, is accepted.

is her strīdhana.⁽¹⁾ So also property which has been acquired by a woman under a compromise decree is her strīdhana.⁽²⁾ So is property which is given to her absolutely as a result of a family settlement.⁽³⁾

Only those categories of strīdhana concerning which highly conflicting decisions were given by the different Courts, were considered in the hitherto discussion. The categories which have been mentioned in the Smritis or categories of the so-called technical strīdhana have always been recognised unhesitatingly by the Courts. Accordingly moveable or immoveable property given

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- (1) Tripura Charan v. Harimati (1911)38 Cal.493. Property given to a woman by her paramour is strīdhana if given after her husband's death - Saraswati Bai v. Kashiram (1884)4 C.P.L.R. 43. In Maharana v. Thakur Pershad (1911)14 Oudh Cases 234, it was held that property given to a woman by her paramour's brother cannot technically be called strīdhana but that it devolves upon her own heirs.
- (2) Raj Rajeshar v. Har Kishen A.I.R.1933 Oudh 170; Kupppammal v. Rukmani A.I.R.1946 Mad.164. In this case the amount given to the relatives of the deceased as compensation for his death by accident was distributed amongst them and the share of the mother and the daughter of the deceased was considered to be strīdhana. On the principle embodied in the then proposed bill for the Hindu code the daughter was given only half the share of the son.
- (3) Vatsalabai v. Vasudeo A.I.R.1932 Bom.83. But property which a woman received under a compromise 'for her sole, absolute and exclusive use' from her husband's relatives whom she had sued for 'her share and proportion in the right of her husband' was held by their Lordships of the P.C. to be not strīdhana. - Rabutty v. Sibchunder (1854)6 M.I.A.1. Looking to the document, however, it appears that the judgement of the H.C. which their Lordships reversed in this case was a correct one. In Dulhin Parbati v. Baijnath (1935)14 Par.518 Mohamood J. gave a queer decision and held that where two co-widows divide their inherited estate and hold it is severally after relinquishing the right of succession to each other's share the share of any of those co-widows, on her death, is, for all practical purposes, strīdhana and would devolve upon her heirs who would be entitled to hold it as long as the other co-widow is alive.

or bequeathed⁽¹⁾ to a woman by her brother,⁽²⁾ mother,⁽³⁾ father⁽⁴⁾ etc. has always been considered as strīdhana.

Similarly whatever the first wife receives from her husband on the occasion of his second marriage, whether gained under a threat or otherwise, is her strīdhana.⁽⁵⁾

A woman's dower is her strīdhana and so also are all gifts which a bride receives from the bridegroom or his family.⁽⁶⁾ But in Surayya v. Balakrishnayya⁽⁷⁾ it was held that such strīdhana cannot be called śulka. Observing that śulka was originally a

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- (1) Property bequeathed is considered to be equal to property given by gift inter vivos - Judoonath v. Bussunt (1873)11 B.L.R.286; Prankissen v. Nayanmoney (1879)5 Cal.222.
 - (2) Gosaien v. Kishenmunnee (1836)Mac.Rep.Vol.IV.77; Munia v. Puran (1883)5 All.310 F.B.
 - (3) Prankissen v. Nayanmoney (1879)5 Cal.222.
 - (4) Janku v. Zeboo A.I.R.1936 Nag.350 (gifts made by the father to his daughter at the time of her marriage were considered to be strīdhana notwithstanding an unsuccessful attempt to prove a custom amongst the Kunbis to the contrary). See also Daolut v. Nand Lall (1895)9 C.P.L.R.95; Sunjeevappa v. Nimba Jetty (1928)6 Mys.L.J.379. For ukanthudama gifts in Kerala, arising Kumkuma gifts in Mysore and hathgarna grants in Kathiawar respectively see Christianiseri v. Ghanaprak-
asam (1904)20 T.L.R.215; Chenna v. Kempamma (1936)14 Mys.
L.J.456; Government resolution concerning Kumribai's appli-
cation (1909)20 K.L.R.145. According to a custom amongst

Addition to p.191 note 4 : Where a landed estate is settled on a woman 'for pasupukumkuma' she gets an absolute estate therein - Chatrathi Jagannadha Rao v. Jatmal Madanlal Jakotia Firm A.I.R.1958 And.Pra.662.

- Ramdulol v. Joymoney (1816)2 Mor.Dig.65.
- (5) Oodey Cower v. Mohun Lall (1791) Montrion p.311.
- (6) Manukchand v. Premkoonwur (1822)Borr.II.321; Surayya v. Balakrishnayya A.I.R.1941 Mad.618; Venkata Reddi v. Sankara Reddi A.I.R.1955 Andhra 31.
- (7) Supra.

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the Nattukottai Chetty community all the property which a
woman receives at the time of her marriage is her strīdhana.-
Palaniappa v. Chokalingam (1929)M.L.J.817. A legacy given
to a woman by her husband's relations is her strīdhana -
Ramdulol v. Joymoney (1816)2 Mor.Dig.65.
 - (5) Oodey Cower v. Mohun Lall (1791) Montrion p.311.
 - (6) Manukchand v. Premkoonwur (1822)Borr.II.321; Surayya v.
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 - (7) Supra.

gratuity paid only to the bride's father which was later on transformed into a gift to the bride herself⁽¹⁾ Horwill J. relied, for his decision, upon Mayne who argues : śulka in the sense of bride-price is obsolete; for, if it is paid to the bride's father it is not strīdhana at all and if it is paid to the bride herself it is only ordinary strīdhana.⁽²⁾ In the first place, the very fact that the śāstra does in fact recognise as śulka property which a bridegroom gives to the bride or her father⁽³⁾ clearly proves that the dilemma posed by Mayne is entirely fanciful. Secondly, it is incorrect to say that śulka in the sense of bride-price is obsolete in India for paying bride-price is almost an invariable rule amongst the millions of the aborigins of India like the Santals, the Gonds, the Bhils etc.⁽⁴⁾ It is quite common

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- (1) Trevelyan 3rd Edi.p.475 and Ghose's Hindu law Vol.I.p.331 were referred to as authority for this statement. Holding that the Mitākṣarā definition ought to be read with the definition in the Smṛitichandrikā Horwill J. observed that śulka is possible also in the Brāhma form of marriage. But he further remarked that such presents to the bride are not śulka unless they are "not tainted with the idea of purchase."
- (2) Mayne 10th Edi.p.755 was relied on. See also 11th Edi.p.743.
- (3) Manu 3.31 read with 3.51 and 3.54 shows that śulka is something paid by the bridegroom to the bride's father etc. See also supra pp. x which prove that śulka is also something which is given directly to the bride herself. In Meenakshi v. Narayana (1891)8 T.L.R.112 it was observed that śulka is property received by the bride's parents etc. in trust for the bride herself. However, śulka is not to be confused with vara-śulka or varadakṣiṇa which is often called in the South strīdhanam. The latter is nuptial property given to the bridegroom by the bride's party and becomes the exclusive property of the bridegroom - Vishnu Savithri v. Krishnau (1909)25 T.L.R.196; Thandaveswara v. Sundaram T.L.R.(1946) 224 F.B.
- (4) Infra pp.630-31.

41,56,64, also
infra pp. 310-
312, 627,
630-31

also amongst the lower classes in Mahārāṣṭra, Gujrat etc.⁽¹⁾

Therefore it is evident that any kind of gratuity paid by the bridegroom or his party to the bride or her parents must be treated as the śulka of the bride.

Ornaments which are given to a woman are her strīdhana if they are given to her unreservedly and, for the purpose of being treated as strīdhana, it is not necessary that they should be constantly worn by the owner woman.⁽²⁾ When given during the celebration of marriage the precise occasion or ceremony at which they are given is not at all important in determining whether they are strīdhana or not.⁽³⁾ The value of such unproductive strīdhana like ornaments is not to be taken into consideration in settling the amount of the owner's maintenance in proceedings instituted by her.⁽⁴⁾

Money given to a woman by her mother⁽⁵⁾ or any of her

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- (1) See for instance, *infra* p.624, also *supra* 42.
- (2) *Radha v. Bisheshur* N.W.F.P.H.C.R.(1874)p.279. But if they are not proved to have been given to her absolutely they do not constitute strīdhana - *Sharad Boyee v. Ragharendra* (1885) 9 Mys.L.R.244; *Mt.Mitha Bai v. Bhikori Lalla* (1887)2 C.P.L.R. 42.
- (3) *Hanuman v. Tulsubai* A.I.R.1956 Nag.63. See also *Bistoo Pershad v. Radha v. Soonder* (1871)16 W.R.115 for a similar ratio whereby it was held that property given by the father at the time of marriage of the bride is to be called 'gift before the nuptial fire' whether it is actually given before such fire or not. It seems *Mitra Miśra* rightly treats the words like 'adhyagni' etc. as possessing a semi-technical meaning - see *supra* p.79.
- (4) *Gurushidappa v. Parwatevva* A.I.R.1937 Bom.135; *Krishnaji v. Anusaya* A.I.R.1939 Nag.130. See also *Parvathy v. Chinna-thumby* (1886)4 T.L.R.4 at 17; *Narayana v. Kuppachi* (1899)15 T.L.R.45; *Anantha v. Chandamma* (1911)17 Mys.C.C.R.92.
- (5) *Doorga v. Tejoo* (1866)5 W.R.53.

husband's relatives⁽¹⁾ is strīdhana. So is any lump sum given as arrears of maintenance⁽²⁾ or 'in quit of her maintenance'.⁽³⁾

Though the property given to a woman for her maintenance is usually not her strīdhana such property is her strīdhana if it is given together with a responsibility for the discharge of certain debts of the deceased.⁽⁴⁾ Moreover the income of such property and purchases made out of the accumulations of such income are her strīdhana.⁽⁵⁾ Thus for this purpose under the Treasury Trove Act⁽⁶⁾ property found by a woman would be her absolute property. Such property comes under the Mitākṣarā heading 'finding' (adhigama) and hence it would become her strīdhana.⁽⁷⁾ Property acquired by a woman by 'seizure' (parigraha) which is hardly different from property acquired by 'finding' would also be considered as being strīdhana.⁽⁸⁾ It is thus clear that with

(1) Ramdulol v. Joymoney (1816)2 Mor.Dig.65.

(2) The Court of Wards v. Mohessur (1871)16 W.R.76; Rajamma v. Varadarajulu A.I.R.1957 Mad.198.

(3) Nellaikumar v. Marakathammal (1876)1 Mad.166.

(4) Sahab Rai v. Shafiq Ahmad (1927)10 C.W.N.972 P.C.

(5) Ram Das v. Ram Sewak A.I.R.1935 Oudh 362.

(6) Act IV of 1878.

(7) Subraminia v. Arunachelam (1905)28 Mad.1 F.B.

(8) Ibid at p.7. However, the learned O.C.J.Sir Subramania Ayyar considers property acquired by 'seizure' to be property acquired by adverse possession. This is, of course, incorrect - see supra p.179note 2. . . Vijñāneśvara and his followers explain 'seizure' as taking possession of such property like water reservoirs, grass, fuel etc. which had no previous owner and 'finding' as discovering (hidden and, of course, unclaimed) treasures. - See Mit.on Yaj.2.114. Thus there is hardly any difference between the two. Objecting that the two definitions in that case become redundant Maskarī defines 'seizure' itself as strīdhana - Maskari on Gau.10.38. But 'seizure' is a mode of acquiring property and not a kind of property.

the exception of property inherited by a woman and property obtained by her on partition the Mitākṣarā definition of strīdhana has been accepted almost totally by all the courts in India.

The question whether there is any presumption, in the absence of any evidence, as regards the nature of property standing in the name of, or in possession of, a woman is an important one. At first in Bengal it was held that it is for the person who asserts such property to be strīdhana to prove so specifically. It was observed in George Lamb v. Govind Money⁽¹⁾ that "A wife, in a Hindu family, setting forward a title on a purchase by means of her own streedhun as exempting particular property from responsibility for her husband's debts, is bound to prove her allegations, first by showing that she really had streedhun funds or other means, and next, by establishing on the best attainable evidence, that the property in question was purchased by her with those means."

Their Lordships of the Madras High Court, however, held that the presumption in such case is in favour of holding such property as being strīdhana and that it is for the opposing party to prove that it is not so.⁽²⁾ The Madras view was later on accepted by the Calcutta High Court and was also approved by

(1) S.D.A.Beng.(1852)125 at 128; see also Brejomohun v. Rathakumari (1864)W.R.60; Chunder Monee v. Joykissen (1864) 1 W.R.107.

(2) Kullammal v. Kupu (1862)1 M.H.C.R.85.

their Lordships of the Privy Council in Diwan Ram v. Indarpal⁽¹⁾ wherein their Lordships held that notwithstanding the fact that the husband's estate at his death is shown to have been considerable the onus of proof does not shift from the reversioners unless the widow's title is shown to have accrued otherwise.

From all the above discussion it is clear that the modern trend of the Courts in India was much more liberal than the one they had in the 19th century and that a more equitable view of treating men and women as being equal in the eyes of the law was already gaining ground before the recent codification in India commenced. Some inequalities remained, and it remains to be seen how far Parliament has succeeded in its attempt to eradicate them. Having surveyed the development and the pre-enactment position of the law concerning acquisition of strīdhana it is now necessary to turn to the history of woman's right of disposing of her strīdhana.

(1) (1899)26 I.A.226. This view has also been followed in Narayana v. Krishna (1884)8 Mad.214 (government promissory notes standing in the name of female member of a joint Hindu family is her strīdhana); Dakhina v. Jagdishwar (1897)2 C.W.N. 197 (even in the absence of proof that the property was bought with the income of husband's estate it is strīdhana); Ram Kinkar v. Commissioner of Income-Tax A.I.R.1936 Pat.267 (the income accruing to the name of a woman in her capacity cannot be assessed for income-tax in the name of her husband as such income is her absolute property); Sisir Kumud v. Jogneswar (1937)42 C.W.N.359. See also Sitaji v. Bijendra A.I.R.1954 S.C.601 at 605 quoted supra p.178.

It has already been shown that the ancient law-givers of the Hindus believed in complete dependence of women and their complete incapacity to own property and that these two doctrines generally receded into the background with the growing concept of *strīdhana*.⁽¹⁾ The earliest *smṛiti* literature represents a transitional stage: the very sages like Manu and Yājñavalkya who declare complete dependence of woman⁽²⁾ also declare her to be entitled to her *strīdhana*, which is her exclusive and absolute property. The later law-givers who continued to presume women to be dependent and ignorant were probably alarmed by the extensive and rapid growth of the categories of *strīdhana* and thought of protecting the interest of women by adopting two methods: firstly, by following the provision of Manu whereby he prohibits relations of women from usurping the latter's property⁽³⁾ and secondly, - this was a new method - by reserving only a part of *strīdhana* to be at the absolute disposal of women. By this second device the alienation of the other part of *strīdhana*, which could be a result of a possible fraud, coercion or deceit of the proposed alienee, was allowed subject only to the approval of some other person having supervisory capacity.⁽⁴⁾

(1) See supra pp. 54-55.

(2) Manu IX.3, Yaj. I.85.

(3) See infra.

(4) According to Medhātithi this device also prohibited women from subsequently repudiating their own transactions by subsequently pleading ignorance as an excuse. "Kevalayā Kṛite kār̥ye nāhaṃ Kiñchijjānāmi tvayā vipralabdhāsmīti vāchanasyāvasaratvāt. Bhartrādyanumatau tu kiṃ vakṣyati." - Medh. on Manu VIII.163. From the word 'bhartrādi' it appears that according to him even relations other than the husband have a right to control alienations by women - a suggestion which is emphatically repudiated by other authors. See infra.

But the diverse provisions of the smṛtis adopting this second method added intricacies to the conflict between the doctrine of dependence and the concept of strīdhana. The commentators who apparently had to co-ordinate and co-relate all the smṛtis with each other according to the rules of interpretation laid down by the Mīmāṃsā or Hindu Jurisprudence.⁽¹⁾ viewed this conflict from different angles. The question of the extent of women's right to dispose of their property independently became as controversial as the question of the extent of strīdhana itself and the two schools resolved the conflict in two different ways. The Bengal school limits the word strīdhana to categories expressly mentioned in the smṛtis but with regard to those categories it confers full right of disposal upon the woman. The Mitākṣarā sub-schools with the exception of the Mithila school are generally inclined to extend with varying degrees the term strīdhana to include many categories which are not mentioned in the smṛtis; but according to these sub-schools women do not necessarily possess an absolute right of disposal in all their strīdhana. Thus as the right to dispose of one's own property has been separated from right to own it absolutely it is necessary to examine the various provisions concerning the former.

(1) For these see supra pp. 9-12.

This question may be sub-divided into the following questions:-

- (1) Is there any property over which women always have an absolute right of disposal?
- (2) What restrictions, if any, are placed upon the right of women to dispose of their own strīdhana?
- (3) Has anybody other than the women themselves any right in strīdhana which belongs to them?
- (4) Whether the status of women affects their right to dispose of their strīdhana?⁽¹⁾

It ought to be noted that Manu does not declare particular kind of strīdhana to be at the absolute disposal of women. He forbids relations of women to usurp their strīdhana⁽²⁾ and, unlike Yājñavalkya,⁽³⁾ does not authorise even the husband of a woman to utilise her strīdhana in exceptional circumstances. But in fact he does not include in strīdhana anything except gifts made to a woman on different occasions. Hence it may reasonably, though the argument ex silentio has its dangers, be inferred that according to Manu all the strīdhana of a woman is at her absolute disposal.

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- (1) Question No.4 could have been phrased as a sub-question to question No.1 but it has been considered separately as the answer to question No.3 is helpful in considering question No.4
 - (2) Manu III.52 and VIII.29 infra.
 - (3) Yaj. II.148 see infra.

The distinction between strīdhana which is at the absolute disposal of a woman and the rest of her strīdhana does not appear to have been anticipated either by Viṣṇu or Yājñavalkya. However, on the subject of saudāyika⁽¹⁾ Kātyāyana declares : "It is well-known that women always have freedom to sell or give away at pleasure their saudāyika even consisting of immoveable property."⁽²⁾ It is obvious therefore that the distinction between saudāyika and non-saudāyika has been introduced into Hindu law at a later stage with a view to adopt the second device of protecting women's interest. The question why only saudāyika has been kept at the absolute disposal of women does not appear to be without an answer. Saudāyika is property which is given to a woman by her relatives as a sort of security for her maintenance in case of distress⁽³⁾ and one would reasonably expect the relatives to be vigilant in watching whether at any time the object behind the original gift is standing in the danger of being frustrated. If under the garb of an alienation a woman is being deprived of her saudāyika by a designing person her relatives would naturally advise her not to part with her property indiscreetly and if she persists in her folly they would be slow to make ^{such} gifts any further.

(1) For the definition of saudāyika see supra p. 71, text no. 51.

(2) Kātyāyana referred to in Vi.Mi.544 etc. See the appendix text No. 58.

(3) See supra p. 71, text no. 57.

It is important to remember another text of Kātyāyana, wherein he declares that wealth earned by women and gifts given to them by strangers are not strīdhana while the rest is strīdhana.⁽¹⁾ The co-relation of this text with the above text about saudāyika is most illuminating for the purpose of assessing women's right of disposing of their own strīdhana; for, in attempting to co-relate these two texts different commentators have arrived at different conclusions which will be considered below. However, from Kātyāyana's own point of view it seems that saudāyika is not the whole of strīdhana but only a part of it. If he considered saudāyika itself to be the sum total of strīdhana he would expressly have said so. Therefore the word 'rest' (śeṣam) in the above text does not represent saudāyika alone.

However, there is one exception to the rule that women can freely dispose of their saudāyika. Nārada says : "Whatever has been given to a woman by her husband through affection she may enjoy or give away at her pleasure even after his death except immoveable property."⁽²⁾ Co-relating this text with Kātyāyana's text about saudāyika all commentators admit that except immoveables given by the husband a woman can alienate at pleasure all her immoveable property having the character of saudāyika.⁽³⁾ Devaṇṇabhaṭṭa in fact cites a text of Kātyāyana

(1) See supra p.74, text no.56

(2) Na.Smr.IV.28, Na.Sam.II.24. See the appendix text No.40.

(3) "Evañcha saudāyike Sthāvaretaraprītīdatte cha strīṇām svātantryam" - Smr.Cha.556, see also Sa.Vi.379.

according to which immoveables given to a woman by her father-in-law etc. appear to be at her absolute disposal.⁽¹⁾

It cannot be doubted that notwithstanding the text of Nārada women can, with the consent of the husband himself, dispose of immoveable property given by him. For she only does not have independent control (svātantrya) over such immoveable property whereas in respect of moveable property given by the husband she enjoys full independence as the word 'yathākāmaṃ' indicates.⁽²⁾ Once such immoveable property is alienated by a woman with the consent of her husband and during his life-time the question whether in the hands of the woman such property was strīdhana or not cannot affect the validity of the transaction; for, the woman, her husband, the alienee and all persons claiming through either of them would be stopped from challenging the validity of the transaction. But the question whether a woman can alienate such property after her husband's death but with his previous consent is a more intricate one. The answer to it depends upon whether the restriction as regards immoveables given by the husband is considered as a mandatory (Kratvartha) or merely^a recommendatory (puruṣārtha) provision.⁽³⁾ But since the restriction regarding the immoveable property is not the main but the incidental

(1) Kātyāyana cited in Smr.Cha.679 and Bal.on Ya'. II.144.

(2) "Yathākāmamityanena svātantryamuktaṃ" - Smr.Cha.656; Sa.Vi.378.

(3) For Kratvartha and puruṣārtha see supra pp.10-11.

object of the injunction contained in this verse, it is better to suppose that it is of a recommendatory nature.⁽¹⁾ Moreover when the husband can give his self-acquired property to a stranger with absolute right of disposal thereof there appears to be no reason why he cannot rectify any inherent deficiency in his wife's right to alienate immoveable property given by himself.

The reason of this restriction on alienation of immoveable property given by the husband appears to lie in the presumption that the husband, when he gives immoveable property to his wife, in fact always reserves his own right to resume the ownership of the property in case he requires it for his own needs. Such presumption cannot exist in the case of gifts made over by other relatives of a woman; for those gifts are specially given for the welfare of the woman and for her maintenance whereas the husband is always bound to look after the welfare of his wife and to provide for her maintenance.⁽²⁾ This responsibility of the husband exists quite irrespective of the gifts which he might have already given to his wife. So the law while it burdens the husband with greater responsibilities also gives him a special right of resumption of gifts.

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- (1) Speaking in the Mīmāṃsā terms the rule giving full right of disposal to women as regards property given to them by their husbands forms a vidhi (rule) whereas the provision concerning immoveables forms an apavāda (exception).
- (2) See "Patiśabdo hi pālanakriyānimittako....." - Medh.on Manu IX.76; "Bhāryāyā bharanāt bhartā pālanāchcha patiḥ smṛitaḥ/" - Ma.Bha.I.104.30.

Another verse of Kātyāyana which has been referred to in the previous chapter may be mentioned here again : "Whatever a woman receives as a gift from her husband she can dispose of at her own pleasure after his death; but if he is alive she should preserve it or should spend it for the sake of his family."⁽¹⁾ This is the reading of the text which is found in the Dāyabhāga, the Smṛitisāra, the Vivādaratnākara etc.⁽²⁾ Banerjee, however, depends upon Jagannātha and adds to the first clause the words "if it be moveable".⁽³⁾ This addition is made obviously with a view to bring this text on par with the above-mentioned text of Nārada and to suggest that even according to this text only moveable property given by the husband is at the absolute disposal of the woman. Whatever might be the interpretation put upon this verse by a late commentator like Jagannātha the reading found in the comparatively older commentaries shown that this text apparently applies to both moveable and immoveable property given to a woman by her husband.

Before coming to the law which is laid down by the various commentators concerning woman's right to dispose of their strīdhana it must be mentioned that the case-law concerning immoveable property given to a woman by her husband has already been dealt with in the previous chapter⁽⁴⁾ as the question whether

(1) See supra p.118 where 'dāya' has been translated as 'inheritance'.

(2) See Da.Bha.IV.i.8; Smr.Sa.f.62(b); Vi.Rat.511 etc.

(3) See Banerjee p.371 where the words are printed in italics.

(4) Supra pp.164-69.

such property is at the absolute disposal of a woman or not has been treated by the Courts as being tantamount to the question whether such property is strīdhana or not. That this equation of the two questions is a mistake which arose through the superimposition of the law of the Bengal school upon that of the Mitākṣarā school can easily be seen from the forthcoming discussion.

Coming to the law as laid down by the commentators it is interesting to note that Vijñāneśvara refers neither to the above verse about saudāyika⁽¹⁾ nor to the verse of Kātyāyana about property earned by women etc.⁽²⁾ Although he refers to Nārada's verse⁽³⁾ about immoveable property given by the husband he does not make any comment as regards the wife's right of alienating such property. His only comment is that the husband should give immoveable property, if ever, only with the consent of the sons as moveable property alone is the proper object of "a gift out of affection."⁽⁴⁾ Vijñāneśvara probably thought that if the husband were freely allowed to make gifts of immoveable property to his wife he is likely to defeat the claims of his creditors by this device.

(1) Supra p.71.

(2) Supra p.74.

(3) Mit. on Yaj. II.114 Nir. edi.p.199 wherein the quotation has been mistakenly ascribed to Viṣṇu.

(4) "Sthāvaravyatiriktasya eva prītidānāyogyatvaniśchayāt." Ibid p.200.

So it is evident that Vijñāneśvara does not divide strīdhana into property which is at the absolute disposal of the woman and property which is not at the absolute disposal of a woman. Whether he intended to put a general restriction on women's right to dispose of their strīdhana is a question which ought to be determined with the help of his general remarks on the subject. To begin with, he emphatically says that women can never possess complete independence.⁽¹⁾ He remarks that they are ignorant and to speak in the terminology of a modern educationalist - that they have a very low intelligence quotient.⁽²⁾ He further states that chaste women are by themselves incapable of even instituting judicial proceedings on their behalf as they have a dependant position.⁽³⁾ Even in his vehement argument to prove that women are incapable of acquiring and owning property he meekly concedes that acquirement of property does not affect the dependent status of women.⁽⁴⁾ He even goes to the extent of admitting that the husband has ownership of his wife.⁽⁵⁾ As he subjugates woman to the overall authority of her husband it is hard to believe that he ever intended to confer upon women absolute right of disposing of their strīdhana. Therefore it is reasonable to conclude that Vijñāneśvara who is quite liberal in interpreting

(1) "Ataḥ kvachidapi strīṇāṃ naiva svātantryaṃ" - Mit.on Yaj.I.85.

(2) "Strīṇāmajñānādaprāgalbhyāchcha." - Mit.on Yaj.II.25.

(3) "Kulastrīṇāṃ patiṣu jīvatsu tatpārtantryādanādeyo vyavahāra iti vyākhyeyaṃ." - Mit.on Yaj.II.32.

(4) "Yattu pārtantryavachanaṃ 'na strī svātantryamarhati' ityādi tadastu pārtantryaṃ dhanasvīkāre tu ko virodhaḥ." - Mit. on Yaj.II.135-36.

(5) See infra pp.251-52.

the word *strīdhana* is totally against granting right of free disposition to women.

However, on this point he is not followed by the other commentators of his school. Mitra Miśra who is next in importance in the Benares school holds that *saudāyika* is at the absolute disposal of a woman.⁽¹⁾ However, he refers to Kātyāyana's verse about wealth earned by women etc. and remarks : "Here there is no repudiation of (these categories) being *strīdhana*. But there is a repudiation of its partition etc. which is (otherwise) possible. It is for that reason that in the next line it has been laid down that the husband has dominion over them. The meaning is that the husband and not the woman has freedom to utilise the same."⁽²⁾ Following Nārada's verse Mitra Miśra states that women have independence only with regard to moveable property given by the husband and that as regards the immoveable property given by him she has only a right to enjoy the same and not a right to dispose of it by gift or sale.⁽³⁾

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- (1) Vi.Mi.544. As usual Mitra Miśra has followed Madanasimha in laying down this and the other following provisions concerning disposal of *strīdhana*. - See Mad.Rat.376-77. The only difference between the two is that according to Madanasimha wealth earned by women and property given to them by strangers is not *strīdhana* - Mad.Rat.376. Dalapatirāja follows Madanasimha - Nri.Pra.237.
- (2) Vi.Mi.542. Mitra Miśra admits that there can be no partition of *strīdhana* during the life-time of its owner. So when he says that there is a repudiation of partition etc. of these categories what he probably means is that the property cannot be inherited by the heirs of the woman after her death but by the husband or his heirs. Or probably he wants to say that the woman cannot distribute or give away these particular categories of *strīdhana* without the permission of the husband.
- (3) Vi.Mi.544.

Kamalākara does not make any comment on Kātyāyana's text about wealth earned by women etc.⁽¹⁾ He does not, however, give complete freedom (svātantrya) to women in immoveable property given by the husband,⁽²⁾ whereas he specifically says that in the case of other immoveable property women have an absolute right.⁽³⁾ From the opinion of Lakṣmīdhara which he cites with approbation⁽⁴⁾ it appears that the words "other immoveable property" in this context refer only to immoveable property which is saudāyika.

Therefore it seems that the later authors of the Benares school discarded Vijñāneśvara's idea about complete dependence of women and allowed them an unfettered right to dispose of their saudāyika with the exception of immoveable property given by the husband.

Nīlakaṇṭha holds that wealth earned by women and gifts obtained by them from strangers are not strīdhana.⁽⁵⁾ To support his stand he adduces Manu's provisions⁽⁶⁾ about women's complete incapacity to own property and says that this provision applies to these categories mentioned by Kātyāyana to be not strīdhana.⁽⁷⁾ This is, of course, the usual explanation given by the commentators who maintain that these two categories of property are not

(1) Vi.Ta.447.

(2) Ibid 444.

(3) Ibid.

(4) Ibid 443.

(5) Vya.Ma. 154.

(6) Manu VIII.416 supra p.50.

(7) Vya.Ma.154-55. See also Smr.Cha.653-54; Vi.Mi.543.

Mad.Rat.376;

strīdhana. But Nīlakaṇṭha further adds : "It is proper (to hold) that the text also indicates lack of freedom in respect of gifts on supersession etc."⁽¹⁾ Now it is certain that the words 'gifts on supersession etc.' do not refer to all the categories of property which Nīlakaṇṭha recognises as strīdhana; for in that case he would have referred to them in the words 'gifts before the nuptial fire etc.' (i.e. adhyagnyādi). It is also evident that by the words 'et cetera' (ādi) he does not mean to refer to the categories included by Vijñāneśvara in the term 'ādya'; for in that case like Vijñāneśvara Nīlakaṇṭha also would have admitted them into the fold of strīdhana. Here it must be remembered that ādhivedanika or gift on supersession is also a kind of bharṭṛidatta or gift given by the husband. And so it seems quite likely that Nīlakaṇṭha wanted to extend the restriction on alienation of immoveable property given by the husband to both moveable and immoveable property given by him and probably to all property which, together with bharṭṛidatta, has, according to him, a special line of succession.⁽²⁾ Incidentally it must be noted that by this remark Nīlakaṇṭha openly suggests that the husband retains dominion even over the superseded wife.

(1) "Ādhivedanikādiṣu api asvātantryaparam iti tu yuktaṃ". - Vya.Ma.155.

(2) See infra p.353.

Bālabhaṭṭa specifically repudiates the idea that strīdhana denotes only that property which is at the free disposal of a woman⁽¹⁾ and states that saudāyika itself does not denote the sum total of strīdhana.⁽²⁾ To support his argument he states that the two verses of Kātyāyana about inheritance immediately follow his verse about saudāyika.⁽³⁾ What he means to say probably is that although inherited property discussed in those two verses is strīdhana it is not at the free disposal of the woman inheriting it. It is important to note in this context that the word 'bhartrīdāya' found in Kātyāyana's verse⁽⁴⁾ and Nārada's verse⁽⁵⁾ has been interpreted by him to mean inheritance and not gift from the husband as is the interpretation of Jīmūta and others.⁽⁶⁾ As Bālabhaṭṭa gives detailed illustrations about the extended list of strīdhana categories found in the Mitākṣarā viz: property obtained by inheritance, purchase, partition etc.⁽⁷⁾ one would expect him to make a detailed statement as to whether each of these categories is saudāyika or not. Unfortunately he does not appear to be very helpful. However, he says : "Sudāya itself is saudāyika the suffix 'ṣṭān'^h being one which augments the original meaning of the word. Or it means that which is obtained from one's own

(1) Bal. on Yaj.II.144 p.256 Lines 6-9.

(2) Ibid p.255 line 21 : "Etena saudāyikam iti strīdhanamātro-palakṣaṇam iti bhrāntoktam apastam".

(3) Ibid p.255 line 19. For the two verses see supra p.118.

(4) Supra p.118.

(5) Supra p.63.

(6) Da.Bha.4.1.8; Smr.Cha. 655 etc.

(7) Bal. on Yaj.II.143.

inheritance. The eastern layers, however, explain it as that which is obtained from the kindred. The category of inheritance (riktha) which has been mentioned before is to be taken as different from this."⁽¹⁾

From this it is clear that according to him inherited property is not saudāyika. By inference it may be stated that according to him all the categories of strīdhana which have been included by Vijñāneśvara in the term 'ādya' are not saudāyika.

He actually regards Kātyāyana's verse about wealth earned by women to be spurious. Alternatively he accepts that the husband has dominion over the two categories mentioned in the verse but allows women to freely dispose of such property in case the husband does not exist.⁽²⁾ He also quotes the text of Kātyāyana⁽³⁾ leading us to the inference that immoveable property given to a woman by any person except her husband is her saudāyika.

In conclusion it may be stated that the provisions of the Bālabhaṭṭī may be considered to be the law for that part of the Bombay province which is governed by the Mitākṣarā in preference to the Mayūkha. However, in the part where the Mayūkha is predominant a woman has right to dispose of property given to her by any of her relatives except any kind of property given to her

(1) "Sudāya eva saudāyikam, svārthikaṣṭhan. Svadāyato labdhamiti vā. Svadāyasambandhibhyo labdhamiti tu prāñchaḥ. Pūrvam rikthapadārthastu etadanyo grāhyaḥ." Bal. on Yaj.II.143 p.254 lines 7-8. But at another place he admits that in the absence of other heirs like daughter etc. the widow can freely dispose of property inherited from the husband.

(2) Ibid p.255 lines 1-3.

(3) Ibid lines 24-27. See supra p.202.

by her husband. It must also be noted here that property obtained by a woman by inheritance, purchase, partition etc. being not strīdhana according to the Mayūkha the question about the extent of woman's right to dispose of such property does not arise at all in considering the śāstric law of this part of the province. But the provisions of the Bālabhaṭṭī should be considered as a supplement to the law of the Benares school on account of the analogy of the basic stand adopted by Bālabhaṭṭa and Mitra Miśra.

Amongst the authorities of the Southern school the Smṛitichandrikā presents a very conservative view. According to Devaṇṇa the text declaring total incapacity of a wife, son and slave to own any property is to be interpreted to mean that they have a right to hold property but not the right to alienate it without the consent of the person to whom they belong.⁽¹⁾ But on the authority of Kātyāyana he admits that saudāyika is an exception to the above rule.⁽²⁾ But he restricts the word saudāyika to property, 'yautaka and the like', which a woman has received during the time beginning with the betrothal ceremony and ending with the conclusion of the ceremony of entering her husband's house after marriage.⁽³⁾ From the textual point of view such a restricted meaning can hardly be justified; for although the first time-limit can be inferred from the literal interpretation

(1) Smr.Cha. 653-54.

(2) Ibid 655.

(3) Ibid. For yautaka see infra. PP 381-83.

of Vyāsa's text,⁽¹⁾ the second time-limit is not capable of being inferred from either of the above texts of Kātyāyana and Vyāsa. Like the authors of the Bengal school Devaṇṇa interprets the word 'bhartr̥idāya' in Kātyāyana's verse⁽²⁾ to mean gift from the husband and co-relates this verse with Nārada's verse to exclude from saudāyika the immoveable property given by the husband.⁽³⁾

Mādhava prefers not elaborately to comment upon saudāyika as defined by Kātyāyana, and he accepts that immoveable property given by the husband is an exception from saudāyika.⁽⁴⁾ It is important to remember that wealth earned by women and gifts given to them by strangers are not strīdhana at all according to Devaṇṇa and Mādhava.⁽⁵⁾ So the question of women's right to dispose of such property does not arise in their digests. But Mādhava does not appear to restrict the word saudāyika comparably with his predecessor Devaṇṇa.

Pratāpa Rudra also appears to follow the general view of Mādhava allowing absolute right to women over their saudāyika excluding immoveable property given by the husband.⁽⁶⁾ Like Bālabhaṭṭa he explains that 'sudāya' itself is 'saudāyika' the latter being a derivative of the former with an addition of a

(1) Supra p.72.

(2) Supra p.118

(3) Smr.Cha. 655.

(4) Pa.Ma. 369-70.

(5) See supra.p.97-99.

(6) Sa.Vi. 378.

suffix 'ṭhak' which does not change the connotation of the term.⁽¹⁾ The objection that, women being incapable of 'dāya' (inheritance), such an etymological explanation does not stand to reason, is met with by Pratāpa Rudra by simply stating that women are entitled to inheritance from their husbands.⁽²⁾ It is also important to note that he is one of the authors who clearly admit as part of their scheme the extension of strīdhana to include property acquired by inheritance, partition etc.⁽³⁾ It would not be wise, however, to jump to the conclusion that Pratāpa Rudra includes inheritance within saudāyika itself; for at another place he refers to saudāyika as symbolical of that which is given by the husband.⁽⁴⁾ He does not refer to Kātyāyana's verse about wealth earned by women etc. and therefore he is of no help in determining whether such property should be treated as saudāyika or not.

Varadarāja is usually of little use in determining such intricate questions; but commenting on Nārada's provision about immoveable property given by the husband he expressly states that according to the opinion of some people such property becomes, in the absence of a person capable of giving consent to an alienation by a woman, incapable of being given (adeyaṃ).⁽⁵⁾ This means

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- (1) Ibid. For different kinds of svārthika pratyayas see the Siddhāntakaumudī of Bhaṭṭoji Dīkṣita edited by Śrīśa Chandra Vasu and Vāmana Dāsa Vasu, chapter XXXVIII.
- (2) "Nanvetadanupapannaṃ.... strīṇāṃ dāyānarhatvāt iti chet, maivam, strīṇāṃ bhartrīdāyārhatvāt" - Sa.Vi.378. For the discussion about the concept of dāya see I.S.Pawat: Dāyavibhāge pp.7, 12, 58, 66-68, 92 etc.
- (3) Supra p.81.
- (4) "Saudāyikaṃ bhartrīdattopalakṣaṇaṃ" - Sa.Vi.377.
- (5) Vya.Ni. 469 ; For the various provisions about deya and adeya see the Dharmakośa pp.791-808.

that according to this opinion a woman has nothing more than a right to enjoy such property and such a view is quite consistent with the general tendency of Vijñāneśvara and Devaṇṇa. Indeed this opinion may be contradistinguished from that of Bālabhaṭṭa who gives absolute freedom to woman as regards wealth earned by her in case her husband does not exist, and as regards property inherited from him in case his heirs do not exist.

Thus it may be concluded that according to the law of the Southern school property which is given to a woman by her relatives with the exception of immoveable property given to her by her husband is at her absolute disposal. The rest of her property is not, and can never be, at her absolute disposal. In considering the law of this school the question whether a woman is entitled to freely dispose of wealth earned by her does not arise at all as such property is not her strīdhana according to this school.

The law of the Mithila school has been laid down by Vāchaspati Miśra in a much simpler manner. Having enumerated and explained all the categories of the so-called technical strīdhana he further remarks : "Such are the categories of strīdhana. This alone is the saudāyika of a woman."⁽¹⁾ After having mentioned Kātyāyana's verse about saudāyika he declares that even in the immoveable property given by the family of the husband the woman has absolute right of disposal.⁽²⁾ He, however, combines Nārada's

(1) Vi.Chi. 139.

(2) Ibid.

verse about immoveable property given by the husband with Kātyāyana's verses about inheritance and comes to a conclusion that moveable property, whether given by the husband or inherited from him, is at the absolute disposal of a woman whereas immoveable acquired by either of the ways is not.⁽¹⁾ From the way he identifies inheritance with gifted property he appears to hold that even after the death of her husband a woman has no freedom to dispose of the immoveable property given to her by her husband.

In giving all these provisions Vāchaspati has obviously followed Chanḍeśvara, the author of the Vivādaratnākara.⁽²⁾ However, there is a slight difference of opinion between the two authors. After referring to the categories mentioned in the smṛitis Chanḍeśvara refers to Kātyāyana's verse about wealth earned by women etc. and explains : "The husband alone has dominion over strīdhana acquired by a woman apart from the above categories : this is the meaning."⁽³⁾ As the husband alone is mentioned as having dominion over the two categories mentioned by Kātyāyana (which are strīdhana only according to Chanḍeśvara amongst the authors of the Mithila school)⁽⁴⁾ it is reasonable to suppose that according to him the woman would gain absolute control over such property after the death of her husband. However, it has been shown that according to other authors of the Mithila school these

(1) Vi.Chi. 140-41.

(2) See Vi.Rat. 511.

(3) "Uktaparakārātiriktaṃ yatstrīdhanam, tatra bhartureva svāmyamityarthah." - Vi.Rat. 524.

(4) See supra.

categories do not form strīdhana of a woman. Therefore the question whether a woman is entitled to dispose of such property or not cannot arise in considering the law of the Mithila school which must be more authoritatively accepted from Vāchaspati, its later and better commentator.

According to the authors of the Bengal school the question of a woman's right to dispose of her strīdhana need not arise at all because of their very definition of strīdhana which, according to them, consists only of that property which a woman can freely dispose of without being controlled by her husband.⁽¹⁾ To lead to this conclusion such great emphasis has been laid by Jīmūta upon Kātyāyana's verse about wealth earned by women etc. that some of the later authors of the Bengal school begin their enumeration of strīdhana with a reference to the provisions of this verse.⁽²⁾

In such a case as this one might reasonably have expected Jīmūta to explain what saudāyika is and to identify it with strīdhana itself. However, he has produced a mere confusion of ideas. He explains saudāyika : "Whatever is obtained from kind relations is the gift of the affectionate kindred."⁽³⁾ But he does not say that saudāyika alone is at the disposal of a woman; on the other hand, he says that all property except that of two kinds mentioned by Kātyāyana is at the absolute disposal of a

(1) See supra p./09.

(2) See Da.Ta. 40; Vya.Sa.Sam. of Nārāyaṇa f.32(a); Sma.Vya. of Raghunātha Sārvabhauma f.56(a) etc.

(3) Da.Bha. 4.1.22.

woman.⁽¹⁾ But we have already seen in the last chapter that he excludes from strīdhana property which has not been expressly included therein by the smṛitis, namely, property acquired by inheritance etc. Therefore it is difficult to state correctly which property is at the absolute disposal of a woman according to Jīmūta.

The difficulty has been noticed by the later authors of the Bengal school like Achyuta and Śrīkṛiṣṇa who remark that śulka, though it is not saudāyika, is at the absolute disposal of a woman since it has been expressly mentioned as strīdhana in the smṛitis.⁽²⁾ Some of the later authors of this school are content merely with stating that, excluding wealth earned by women and property given to them by strangers all property which is received by a woman from both of her families is her saudāyika.⁽³⁾

As it has been admitted by the authors of the Bengal school that woman has some kind of ownership⁽⁴⁾ in the two categories mentioned above and as only the husband is mentioned to have a dominion over them it would have been reasonable to suppose that such property, on the death of the husband, becomes strīdhana of a woman and remains at her absolute disposal. By analogy the same rule should have been made applicable to immoveable property given by the husband. The leading authors, Jīmūta and

(1) Da.Bha. 4.1.21.

(2) Supra pp.111-112.

(3) Vya.Sa.Sam. f.32(a); Da.Vya.Sam.f.1(b).

(4) See Supra p.116.

Raghunandana, do not consider this contingency at all. However, according to Vidyāratna Smārtabhāṭṭāchārya the two categories mentioned by Kātyāyana are succeeded to by the husband's heirs after his death.⁽¹⁾ To the same effect is the provision given by Raghurāma Śiromaṇi who treats the above three categories as non-technical strīdhana.⁽²⁾ This provision is obviously not compatible with the position adopted by Jīmūta etc. who clearly state that the woman has ownership (svatva) in such property; for no explanation is given as to why the woman's interest in the property, instead of getting enlarged, altogetherly lapses after her husband's death. From a logical and a Mīmāṃsā point of view the heirs of the husband have nothing except his 'dominion' (svāmya) to inherit; to imagine that they are entitled to inherit also ownership (svatva) in the property appears to be utterly unjustifiable.

However, accepting the law as laid down by the authors of this school it may be concluded that according to this school all the strīdhana of a woman is at her absolute disposal with a corollary that property which is not strīdhana is not capable of becoming strīdhana at any time so as to be at the independent disposal of a woman.

Many of the older commentators such as Medhāththi, Viśvarūpa and Vijñāneśvara, do not make any provision for keeping

(1) Smr.Sa.Vya. f.42(a).

(2) Da.Bha.Di.verses Nos. 54-55.

some specific property at the absolute disposal of women. The law which has just been stated was a later development. However, even as late as in the 18th century two views, one conversative and the other a liberal one, persisted amongst the commentators. Durgayyā, the author and the commentator of the *Dāyadaśaślokī* adheres to the conservative school and remarks : "The freedom which has been spoken about here as pertaining even to the immoveable property consisting of *saudāyika* does not exist in the Kaliyuga."⁽¹⁾ On the other hand, *Vāchaspati Miśra*, the author of the *Smṛtisāra-saṅgraha*, divides *strīdhana* into *saudāyika* and non-*saudāyika*, gives absolute freedom to women in their *saudāyika* and as regards the non-*saudāyika* category which, according to him, includes the two kinds mentioned by *Kātyāyana* he remarks : "The husband has dominion over the second category (and) his dissent creates an impediment to a transaction by the woman; the transaction, however, remains valid as she alone has ownership in the property."⁽²⁾ The author of the *Dāyarahasya* also supports him.⁽³⁾ Thus both authors apply the doctrine of *factum valet* to transactions

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- (1) *Yattvatra saudāyikaviṣaye sthāvareṣvapi svātantryamuktaṃ tat Kaliyuge na bhavati.* - *Da.Da.Slo.f.39(a)*.
- (2) "*Tatrādyam striyā tatsvacchandato vyavahāryam ... dvitīye cha bhartuḥ prabhutvaṃ tadvimatau striyā vyavahāre pratyavāyaḥ vyavahāraṣtu siddhyatyeva svamātrasatvāt tadubhaye adhikāra kalpyate*". - *Smr.Sa.Sam.f.44(a)*.
The underlined word should be really read as '*svamātrasatvāt*'.
- (3) *Da.Ra.I.O.L.Microfilm No.366 f.8*. See *supra* p.117.
For the doctrine of *factum valet* reliance is usually placed upon *Da.Bha.2.30* - See *Mayne* p.39; *Gupte* p.50 etc.
But the above two authors give a more direct illustration of the application of the maxim.

concerning non-saudāyika property of women and this is definitely a more reasonable and an equitable view. For originally the Śāstra did not allow even men to alienate to their immoveable property⁽¹⁾ but the later śāstric writers removed this impediment and held that this restriction did not apply to self-acquired property.⁽²⁾ There is no reason therefore why the restriction as regards property of women should not be set aside in favour of women. But other śāstric writers never seem to have adopted this liberal view.

Coming to the nature of the restriction placed upon alienation by women one must look to the concept of dependence as it prevailed in the minds of the smṛiti writers. Nārada declares that only three persons, namely, the king, the preceptor and the head of the family in each house, are independent in this world whereas the subjects, the student and the wife, the son, etc. respectively are not independent.⁽³⁾ As a result of this woman

(1) See Nārada cited in Mit. on Yaj.II.114 p.199; Apa. on Yaj. II.123; Vi.Mi.413 etc.

(2) See the comment of Vijñāneśvara upon the above verse of Nārada. See also Mayne p.739. However, Mayne's statement on pp.738-39 to the effect that wealth earned by women and property given to them by strangers is strīdhana according to the Smṛitichandrikā and the Mayūkha, obviously proceeds from complete ignorance about the provisions of these treatises. On this point the Southern school is on all fours with the Bengal school. See supra.

(3) Trayah svatantrā loke'sminrājachāryastathaiva cha/ Prativarnṇam cha sarveṣāṃ varṇānāṃ sve gṛihe gṛihi// - Na. Smr.I.32. Asahāya remarks 'Yathoktastrayopi svatantrā uttarādhara viśeṣāpekṣayā.' Haradatta on Apa.Dha.Su. says "Na cha patyusśvayamārjitasya viniyoge jāyāyā anumatyapekṣā, svatantratvāt. Svatanthro hyasau gṛihe yathā rājā rāṣṭre." See also Bal.on Yaj.II.52 p.70 which contains a remark to the same effect. In resorting to this analogy both these authors probably had in their mind the above-mentioned verse of Nārada.

was not supposed to have the freedom of dealing with her own property. Thus Nārada declares : "The wise call transactions by women as unauthoritative, especially the transactions of gift, mortgage and sale of house and land. These very transactions become authoritative if the husband, or in the absence of the husband the son, or in the absence of the husband and the son the king, consents."⁽¹⁾ Bhavasvāmi says that the intention of this restriction is to show that women are perpetually dependent.⁽²⁾ To avert a possible objection that this provision of Nārada refers only to the husband's property Maskarī quotes Vyāghra and Lokākṣi who assert that she cannot deal with her own property with absolute freedom.⁽³⁾ Commenting on Manu's text declaring women's complete incapacity to own property, Medhātithi and Kullūka take the same stand.⁽⁴⁾

In laying down the restriction on alienation by women the commentators of the different schools, however, rely upon the text of Manu which is as follows : "Women should not, without the consent of their husband, expend anything from the funds which are common to many persons or from (one's or the husband's ?) own

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- (1) Na.Smr.I.26-27; Na.Sam.I.22-23. Bhavasvāmi who reads 'anāpadi' instead of 'manīṣiṇaḥ' as read by Asahāya adds "Anāpadi, āpatpratīkāṛārthaṃ kṛitāni pramāṇānyuktaṃ bhavati. ... Apadyapi grihakṣetram na pramāṇam."
- (2) Ibid "Ētatpratipāditam bhavati asvātāntrā sarvadā strīti."
- (3) Maskari on Gau.18.1. Medhātithi also appears to have accepted the implication of Nārada's text as comprehending all kinds of woman's property - see Medh. on Manu VIII.163.
- (4) Manu VIII.416.

property."⁽¹⁾ Of the three commentators of Manu who try to explain the underlined words in the verse (svakāt vittāt) Kullūka and Rāghavānanda take them as referring to the husband's property whereas Sarvajñanārāyaṇa says that these words refers to her own separate property excluding strīdhana. It is noteworthy that none of Manu's commentators except Nandana ^Pexplains this verse as referring to strīdhana.⁽²⁾

Other commentators like Devaṇṇabhaṭṭa, Nīlakaṇṭha and Mitra Miśra, however, take this verse as establishing a general prohibition restricting women's right to deal with their own property subject only to the exception of saudāyika which has already been discussed.⁽³⁾ Devaṇṇa who usually adopts an extremely conservative attitude applies the above text to the common property of husband and wife and to the separate property of women and goes to the length of asserting that a woman cannot even enjoy (bhoga) property without the consent of the controlling person.⁽⁴⁾ However, on this point he has not been supported by any other commentator. In fact Mitra Miśra who himself does not allow an absolute interest to a woman in immoveable property given to her by her husband says that she has a right to enjoy such property but not the right to sell or give it away.⁽⁵⁾

(1) Manu IX.199.

(2) Chāṇḍeśvara also seems to have adopted the same stand - see Vi.Ra.509.

(3) Smr.Cha.654; Vya.Ma.155; Vi.Mi.544.

(4) "Svatantrānanujñayā paratantrāḥstriyaḥ strīpumsasādhārāṇa-vittāt ātmīyavittādvā tyāgbhogādikaṃ na kuryurityarthaḥ." - Smr.Cha.654 Medh. on Manu VIII.416 contains the same general restriction but only as regards utilising (vinīyoga) property.

(5) Vi.Mi.544.

Therefore as a conclusion it may be stated that where a woman does not possess an absolute interest in her property she has a right to enjoy that property but not a right to sell, give away or mortgage that property or to do anything which might encumber its corpus. However, she can do any of these things provided her husband consents to the respective transaction. In interpreting and applying this restriction to individual cases it must not be forgotten that the motive behind this restriction is not to hinder women's progress but to protect them and their own interest. This is the probable reason why Vijñāneśvara who is quite eager to increase the proprietary capacity of women does not say a word against such restriction.

Coming to our third question, while examining the rights of persons other than the woman herself in strīdhana it must be ascertained whether any other person has right of ownership in strīdhana and if not whether any other person has any right other than that of ownership in strīdhana.

As regards the first facet of this question the Śāstra has been uniform in denying to any person other than the woman herself any kind of ownership in strīdhana. Manu declares an otherworldly punishment for those who deprive women of their own property⁽¹⁾ and also inflicts a judicial fine on them. He says :

(1) See Manu.III.52 and Medhātithi's explanation of the word 'strīdhanāni'. See also Manu IX.200.

"A just king should punish the relatives of women, who try to deprive them of their property during their life, with a sentence which is imposed for theft."⁽¹⁾ Medhātithi explains that their property is to be protected especially from their relatives since, knowing the woman to be utterly dependent they try to usurp the property upon various pretexts.⁽²⁾ The provision makes it amply clear that the position of a person usurping strīdhana is equal to that of a thief thereby suggesting that no relative has any right of ownership in strīdhana. The Śāstra also declares that living upon woman's strīdhana constitutes a second-grade sin on the part of the male who does it and prescribes that he should undergo an expiation for that.⁽³⁾

The point has been made absolutely clear by Kātyāyana who says : "Neither the husband, nor the son, nor the father, nor the brothers have power to take or dispose of strīdhana. If any one of these forcibly consumes strīdhana he must repay it together with interest and shall also incur a fine. However, if he consumes the same after he has been permitted, out of affection (by the woman) he may repay the capital only whenever he becomes rich (again)."⁽⁴⁾ He makes a further concession : "Whatever has been given (to the husband) by a woman, out of affection, knowing him to be afflicted by a disease or suffering from distress or

(1) Manu VIII.29. For the punishment to be inflicted for theft see Manu VIII.321.

(2) "Te hi bahubhirupāyairapaharanti, asvatantraīṣā strī kiṃ dadāti kiṃ bhunkte vayamatra svāmina iti" - Medh.on Manu VIII.29.

(3) See infra p.530.

(4) Kātyāyana quoted in Vi.Mi.545 etc. See the appendix texts nos.63-64 No.

harrassed by creditors, he should repay of his own accord."⁽¹⁾

Considering the position of the superseded wife of a polygamous person he adds a proviso : "If, however, he has two wives and he does not love that one (who gave him strīdhana) he should forcibly be compelled to return even that which was given to him out of affection."⁽²⁾

After giving the enumeration of strīdhana Devala also declares : "The woman herself alone can enjoy such property; the husband has no right to it except in distress. If he utilises or disposes of the same without reason he should repay it to the woman together with interest."⁽³⁾

The verses are quite simple, not to say eloquent, and do not need any comment. A meticulous attempt to safeguard the interest of a woman from all possible dangers is clearly visible. Commenting on Devala's verse Devaṇṇa and Mitra Miśra says that the prohibition against the husband includes also a prohibition against the brother etc. by the daṇḍāpūpanyāya.⁽⁴⁾ Together with Nīlakaṇṭha and Pratāpa Rudra they also affirm that Kātyāyana's verse 'Neither the husband etc.' clearly shows that men always suffer

(1) Kātyāyana quoted in Smr.Cha.658 etc. See the appendix text No.61.

(2) Kātyāyana quoted in Vi.Mi.545 etc. See the appendix text No.59.

(3) Devala quoted in Vi.Mi.545 etc. See the appendix text No.79.

(4) Smr.Cha.657; Vi.Mi.545-46. For the daṇḍāpūpanyāya see infra p.397. Really speaking the Kaimutikanyāya should have been resorted to.

from lack of freedom (asvātantrya) in strīdhana.⁽¹⁾ This 'asvāt-antrya' denotes lack of ownership as well as lack of right to dispose of property; for Devaṇṇa specifically says that it is not merely dependence (pāratantrya), which denotes existence of ownership but non-existence of the right to dispose of the property which is the object of that ownership. This is clear, as Devaṇṇa points out, from the fact that the husband, even if he consumes strīdhana with the permission of the woman, has to return at least the capital.⁽²⁾ So jealous indeed is the Śāstra of the husband's consuming his wife's strīdhana that Kātyāyana allows a woman even forcibly to recover any strīdhana given by her to the husband in case he does not maintain her properly.⁽³⁾ Thus it is obvious that under no circumstances may a husband or any other person utilise the corpus of strīdhana without incurring a liability to repay it, the only exception being that of a husband who has utilised it with the permission of his wife but has no funds to repay it.⁽⁴⁾

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- (1) "Puruṣāṇām tu strīdhane sarvatrāsvātantryameva ... svāmitvābhāvādityabhiprāyaḥ." - Smr.Cha.656; see also Vya.Ma.155; Sa.Vi.378 and Vi.Mi.544.
- (2) "Anujñāpya bhakṣaṇe'pi mūlyapradānābhidhānāt bhartrādīnāmasvātantryamavagamyate, na punaḥ pāratantryamātram." - Smr.Cha.656; see also Sa.Vi.380.
- (3) Kātyāyana quoted in Vi.Mi.545 etc. See the appendix text No.60
- (4) "Dhanavānyadi bhavedityabhidhānāt mūlyamātramapi nirdhano na dāpya ityarthāt gamyate." - Smr.Cha.656; see also Sa.Vi.380.

Incidentally Devaṇṇa and Pratāpa Rudra take the opportunity of discussing the relative position of the husband and wife concerning their proprietary interest in each other's property. It is well-known that the wife, upon her marriage, acquires ownership in her husband's property.⁽¹⁾ This ownership relates to property acquired by him before as well as after marriage.⁽²⁾ However, the position of a wife as an owner of his property is a subordinate one : her rights are subject to the predominant authority of the husband. However, if she consumes some of his property she cannot be called a thief.⁽³⁾ Her position in this respect may correctly be expressed by the word 'pāratantrya' or dependence. On the other hand the husband, if he takes the strīdhana of his wife without sufficient reason or her permission, becomes liable not only to repay it with interest but to pay a fine which is imposed for theft. Thus although he gains dominion over the two kinds of property acquired by the woman and, according to some authors, over some non-saudāyika categories of strīdhana he has no kind of right at all over the bulk of strīdhana called saudāyika and no right of ownership at all in any kind of strīdhana. From a proprietary point of view therefore the Śāstra is more favourable

(1) See supra pp. 46.

(2) See Bal. on Yaj. II. 52. Bālabhaṭṭa compares the wife's acquisition of ownership in her husband's property upon her marriage with a son's acquirement of ownership in property which his father has already acquired before the son's birth.

(3) See Apa. Dha. Su. II. 6. 14. 20 and Haradatta's commentary on it.

to the wife than the husband.⁽¹⁾

However, Hindu law was never so individualistic as to allow a complete segregation of property in favour of one person. The family was considered as an important component of the society and as possessing a common interest in looking after its own welfare. The needs of the family were, therefore, always considered to transcend, in importance, the individual interest. Strīdhana could not possibly be an exception to this general rule. Although the members of the family had no legal right in the strīdhana of the female members of the family, in case of distress the husband of any such female member could always look forward to relieving himself and the family of their trouble with the help of her strīdhana in case they had no funds of their own. Thus Yājñavalkya declares : "The husband need not repay to his wife the strīdhana which he has taken during a famine, or for the performance of a religious duty, or during illness or forcible restraint."⁽²⁾ Devala also authorises the husband to utilise the strīdhana of his wife to relieve a son⁽³⁾ in distress.

Devanṇa and Mitra Miśra specifically add that only the husband has a right to take the strīdhana of a woman and nobody

(1) "Evañcha vivāhena bhāryāyāḥ bhartrīdhane nityapāratantryaṃ svāmitvaṃ sampadyate, na punarbhartuḥ bhāryādhane tādṛśama-pītyavagantavyaṃ. Ata eva bhartuḥ strīdhanabhoge'pyanarhatāmāha Devalaḥ ...". - Smr.Cha.656; see also Sa.Vi.380. But for husband's right to dispose of his wife's strīdhana see infra.

(2) Yaj.II.147.

(3) Devala quoted in Vi.Mi.546 etc. See appendix text No.79.

else may do that.⁽¹⁾ Vijñāneśvara adds that even the husband, if he takes strīdhana under any circumstances other than those mentioned by Yājñavalkya, has to repay the same.⁽²⁾ Mitra Miśra says that even if the husband takes his wife's strīdhana under the circumstances mentioned by Yājñavalkya he must repay it if he has the capacity to do so.⁽³⁾ Aparārka also appears to have a similar opinion.⁽⁴⁾ Aparārka, Mitra Miśra etc. make it clear that the husband can take strīdhana only in case he does not possess funds of his own.⁽⁵⁾ In the words of Devaṇṇa he can do so only 'in case he is left with no other alternative'.⁽⁶⁾

The word 'famine' in Yājñavalkya's verse is easy enough to understand. According to Viśvarūpa, Vijñāneśvara, Aparārka and Nīlakaṇṭha⁽⁷⁾ only obligatory duty is meant by the words 'performance of religious duty' (dharmakārya) whereas Devaṇṇa intends to include in them performance even of optional religious duties (kāmya).⁽⁸⁾ The second interpretation is evidently going too far; for the tenor of the text appears to give the right to the husband with great reluctance and only under exceptional circumstances,

(1) Smr.Cha.657; Vi.Mi.546; Sa.Vi.381 etc.

(2) Mit.on Yaj.II.147. It is to be noted that although Vijñāneśvara does not allow the wife to institute judicial proceeding against the husband he makes an exception to the rule in case the husband utilises the strīdhana of his wife in the absence of any calamity - Mit.on Yaj.II.32.

(3) "Sati tu sāmāthyē durbhikṣādigrāhītāmapyavaśyaṃ ^{deyam} ॥" - Vi.Mi.546.

(4) "Pratidānasamarthadhanābhāve cha tattasyai na dadyāt." - Apa.on Yaj.II.147.

(5) "Svakīyadhanābhāve" - Apa.on Yaj.II.147; Vi.Mi.(tīkā) on Yaj.II.147.

(6) "Gatyantarābhāveneti śeṣaḥ." Smr.Cha.658.

(7) Vya.Ma.156.

(8) Smr.Cha.658.

and the number of the optional religious duties being unlimited this interpretation would allow the husband ample pretext for utilising his wife's strīdhana.

The word 'restraint' (sampratirodhaka) in Yājñavalkya's verse has been taken by Viśvarūpa, Vijñāneśvara, Devaṇṇa etc. as restraint by a creditor in case of non-payment of debt.⁽¹⁾

Vāchaspati Miśra, however, takes that word as an adjective of the word 'illness' (vyādhi) allowing the husband thereby to take strīdhana of his wife in case he is suffering from illness which precludes him from following his normal avocation in life.⁽²⁾

Commenting on Devala's verse Devaṇṇa points out that the word 'son' therein stands symbolically for the whole of the family and says that the husband has a right to take strīdhana in any case of extreme mischance (mahāsaṅkṛāṭa) which cannot be avoided because of want of funds.⁽³⁾ This indeed appears to be the crux of all the provisions given above, namely, that when the family is caught in an unusual calamity and the funds of the family are insufficient to relieve it the members of the family should be in a position to look to strīdhana in the last resort for help. This is the curious way in which strīdhana, which was originally meant to be only a provision for the maintenance of women themselves in case

(1) "Dhanādānam vinā nivārayitumaśakye dhanikāsedhādau" - Smr.Cha.658.

(2) Vi.Chi.141.

(3) Smr.Cha.657; Vi.Mi.546.

of need, serves, in exceptional cases, also the purpose of maintaining the existence of the family itself.

Apparently it appears that the provision of such exceptional use of strīdhana which is given by Yājñavalkya is an exception to the general rule 'Neither the husband, nor the son ...etc.'⁽¹⁾ as given by Kātyāyana which specifically forbids the husband, the son and other relatives to utilise strīdhana; so the question which inevitably presents itself is whether all of these relatives are empowered by this exception to lay their hands upon strīdhana in the above-mentioned circumstances. Relying on the fact that only the husband has been mentioned in Yājñavalkya's and Devala's verses as being capable of taking strīdhana the commentators emphatically repudiate the idea that anybody except the husband should be able to take strīdhana in circumstances like famine etc.

It is not difficult to understand why the husband alone should be selected as the person capable of exercising this exceptional right. The explanation may be found in the answer offered by Devaṇṇa and Pratāpa Rudra to a question which is as follows. It has already been admitted that the husband has no ownership (svatva) in strīdhana nor has he freedom to dispose of or to utilise it generally for his own purposes.⁽²⁾ In such a

(1) See supra p. 225.

(2) See supra pp. 227, 229. In his chapter on the "dattāpradānika" Devaṇṇa also remarks : "Anvāhitvāt strīdhanamapyadeyaṃ svatvābhāvāt".

case as this, that the husband should be allowed to utilise strīdhana - albeit in exceptional circumstances - appears to be incompatible with the already accepted position.⁽¹⁾ Devaṇṇa resolves this incongruity by saying that although the woman has dominion over her property the husband has dominion over the woman herself; hence the husband also has a right to utilise, in exceptional circumstances, the property of the person over whom he can exercise dominion.⁽²⁾ The explanation obviously relies upon the provision of Manu whereby he declares that the wife, the son and a slave are incapable of owning property and that the property which they acquire belongs to the person to whom they themselves belong.⁽³⁾ It can therefore easily be seen why, according to the

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- (1) The incongruity arises because of the Mīmāṃsā principle that the owner of the property alone is entitled to dispose of that property. See infra pp.247-48.
- (2) Smr.Cha.657-58 : "Nanu paradhanatyāgabhogē parasya svāmyanunjñayā vinā kathamarthā ? Uchyate : svāmyanujñābhāve'pi pūrvoktaviṣaye svādhīnajanāsvāmyake tu strīdhane yatheṣṭaviniyogānarhe'pyāpadapanodakatyāgabhogādāvarhatāstītyasmādeva vachanāt kalpyata ityadoṣaḥ." Devaṇṇa appears to use the words 'svāmya' and 'svatva' as denoting ownership and property in its abstract sense - See Smr.Cha.600-2. The reading of the above passage in Mr.Gharpure's edition p.283 is slightly different in the case of some words and evidently faulty at one place. He reads 'yatheṣṭaviniyogārhe api' instead of 'yatheṣṭaviniyogānarhe api' ignoring thereby the very essence of the question that is confronting Devaṇṇa. The word 'api' (although) balances two antithetical statements about strīdhana being incapable of being spent at pleasure by the husband, and about strīdhana being capable of being spent, on certain occasions, without the consent of the owner. Mr.Gharpure's reading has been reprinted in the Dharmakośa p.1461 also.
- (3) Manu VIII.416.

commentators, the husband gets an exceptional latitude of utilising his wife's strīdhana in certain circumstances.

Whether this position is tenable from a Mīmāṃsā point of view or not will be discussed below.⁽¹⁾ It would be sufficient to observe at this stage that the protection given to strīdhana has been itself introduced as an exception to the overall authority of the husband as expressed by Manu: such being the case the explanation hardly sounds as convincing. As a shrewd commentator and an honest Mīmāṃsaka Devaṇṇa does not forget to mention that ultimately the scripture itself is the authority behind such a proposition and reasoning.⁽²⁾ Mitra Miśra also expresses a similar opinion.⁽³⁾

(1) Infra pp.247 onwards.

(2) Smr.Cha.657-58 quoted supra. p.233.

(3) Vi.Mi.546. Mitra Miśra says : "Vachanabalāttādriśaviṣaye vyaye svatmeva tasya tatretyadoṣaḥ." Thus he confers upon the husband a kind of ownership in the property to be disposed by him. The word of scripture is an authority for itself and, for its validity, does not require any other means of proof like direct perception, inference etc. This strength of the scriptural word is called vachanabala. Jaimini's sutra which is the basis of this vachanabala runs : "Autpattikastu śabdasyārthena sambandhaḥ, tasya jñānamupadeśaḥ, avyatiṛekaśchārthe'nupalabdhe tatpramāṇaṃ Bādarāyaṇasyānapekṣatvāt." - Jai.Su.I.1.5. Śabara comments 'Dharme chodanāpramāṇyaṃ'. The following comments are found in the other commentaries : "Dharme vidhipramāṇyaṃ" - the Nyāya-mālāvistara and the Śaḍdarśana; "dharme vedasya svataḥ pramāṇyaṃ" - Subhodhinī of Rāmeśvara Sūri; "śabdasya svataḥ pramāṇyaṃ" - Vaidyanātha's Nyāyabindu; - all referred to in the Mīmāṃsakośā of Kevalānanda Sarasvati p.2.

Although such a technical reasoning is given by the commentators for such an incongruous provision the real reason behind it appears, as has been already stated above, to be the intention of preserving the safety of the family as a whole - a goal which was never lost sight of by the Śāstra, notwithstanding its increasing inclination towards individualisation of property. Usual laws were inapplicable if a particular person went outside the scope of his own authority and did something which was considered indispensable for the benefit of the family in distress. Thus the wife or any other dependent including even a slave, who was ordinarily not entitled to burden the family with a debt, could certainly do so if the debt was incurred for the family's necessity (kuṭumbārtha lit. for the sake of the family).⁽¹⁾ Similarly according to Bhavasvāmi, Narada's total prohibition on alienations by women was applicable only in the absence of "calamity", certain rights of alienation being granted to women in case of calamity.⁽²⁾ In case of calamity even the religious laws were suspended and the Śāstra authorised people to adopt for the time being a non-śāstric behaviour called āpaddharma.⁽³⁾

(1) See Brihaspati quoted in Vi.Mi.272 etc; Kātyāyana quoted by Aparārka on Yaj.II.145; Na.Smr.IV.18 & Na.Sam.II.15; Na.Smr.IV.12 & Na.Sam.II.10 referred to in the Dharmakośa pp.708, 712; 698 and 696.

(2) See Na.Smr.IV.18 supra.

(3) See the āpaddharmaprakaraṇa of the Mitākṣarā (on Yaj. III.35-44). In case of calamity the usual religious laws about āchāra are relaxed even in the case of a brāhmaṇa. See also Brihaspati referred to in Mad.Rat.326. The famous story of the sage Viśvāmitra who could, in days of famine, successfully offer in sacrifice and eat the leg of a dog is referred to in Vi.Mi.425.

It is no wonder therefore that the Śāstra allows the husband to utilise his wife's strīdhana in distressing circumstances.

Here Banerjee correctly points out a difference between the attitude of Vijñāneśvara and Jīmūtavāhana.⁽¹⁾ According to the former any kind of strīdhana comes under the disposing power of the husband only in case a calamity like famine etc. mentioned by Yājñavalkya exists;⁽²⁾ this rule applies even to wealth earned by women and gifts given to them by strangers which come under the omnibus definition of strīdhana given in the Mitākṣarā. According to Jīmūta, however, these two categories of property are at the disposal of the husband even in the absence of famine etc.⁽³⁾ From this point of view the husband's position is slightly less advantageous under the Mitākṣarā provisions. But on the other hand whereas Jīmūta declares saudāyika to be at the absolute disposal of a woman⁽⁴⁾ Vijñāneśvara abstains from doing so apparently

(1) Banerjee p.376.

(2) For Vijñāneśvara says "prakārāntareṇāpaharan dadyāt". - Mit. on Yaj.II.147. He also authorises the wife to sue her husband in case he takes her strīdhana without sufficient cause - see supra.

(3) Da.Bha.4.1.20; " ..tatra bhartuh svāmyaṃ svātantryaṃ, anāpadyapi bhartā grahītumarhati,...". This shows that according to Jīmūta 'svāmya' is the same thing as 'svātantrya'. See also Da.Ta.40; Da.Kra.Sam.18. In his own treatise Śrīkṛiṣṇa explains that the husband possesses 'svātantrya' in the 'strīsvāmikadhana' only because of the vachanabala. For vachanabala see supra p.234.

(4) Da.Bha.4.1.21.

suggesting thereby that the validity of any alienation by a woman is subject to the ratification by her husband who avowedly possesses a dominant position with respect to his wife.⁽¹⁾

Banerjee rightly points out also that there is hardly any difference between the Benares school and the Bengal school on this point since Mitra Miśra adopts a position very similar to that of Jīmūtavāhana.⁽²⁾

The question about the anomalous right of the husband to dispose of the property of someone else becomes all the more pertinent here as both according to the Benares school and the Bengal school woman has ownership in wealth earned by her and in property given to her by her strangers. The right given to the husband over these two kinds of property is much wider than the right given over the so-called technical strīdhana. Mitra Miśra especially has taken a position creating a self-contradiction; for he admits these two kinds of property to be strīdhana, which means that they come under the general rule accepted by Mitra Miśra himself, namely, that men do not have freedom of disposing of any kind of strīdhana.⁽³⁾

Thus Vijñāneśvara seems to be holding the most balanced outlook: he appears to restrain capricious and foolish alienations of property by women by impliedly making them valid subject

(1) Supra p.228.

(2) Vi.Mi.542. Mitra Miśra also interprets 'svāmya' as 'svātantrya'.

(3) Vi.Mi.544 : "Puruṣaṅāpī kasminnapi dhane na svātantryam".

only to ratification by the husband in all cases whereas he shrewdly averts a possible abuse of the husband's power to utilise strīdhana by making that power exercisable with regard to any kind of strīdhana, only in the case of extreme distress like famine etc. At the time and the place - and this was definitely the South where women had comparatively more freedom than they had in the North - the Mitākṣarā was written this check and the countercheck probably offered the best possible device to promote with sufficient security the growth of the proprietary capacity of women.

There is a text of Devala which ought to be considered here. It runs : "The sons should give the strīdhana promised by the husband as if it were (their) debt."⁽¹⁾ Apparently this means nothing less than the fact that a mere promise of gift by the husband to his wife creates her ownership in the promised gift and that if the property concerned is not actually handed over to her it remains in the hands of the husband on trust for his wife. If this deduction is correct this provision appears to be an exception to the general rule that in case of gift transfer of possession by donor to donee is essential to bring about the transfer of ownership.⁽²⁾

(1) Devala quoted in Vya.Ma.153. See *infra* pp.272-73.

(2) The smritis mention acceptance (pratigraha) and not gift (dāna) as one of the modes of acquisition - Manu X.115; Na.Smr.IV.52 & Na.Sam.II.48. But see Dr.J.D.M.Derrett : An Indian Contribution to the Study of Property B.S.O.A.S.1956 p.475 at pp.492-95.

Commentators, however, disappointingly make irrelevant comments on this text just to reaffirm the points which they have repeatedly iterated elsewhere. Thus devaṇṇa says that this shows that the sons etc. have no dominion over strīdhana and that there can be no partition of strīdhana during the life-time of the female owner as she alone has ownership in the same.⁽¹⁾ He, however, correctly points out that from the use of the word 'debt' it appears that the word 'son' represents the grandson as well.⁽²⁾ Mitra Miśra makes a similar comment adding, however, that this shows that although the sons have a right by birth in the strīdhana of their mother there cannot be any partition of it during the life-time of the mother.⁽³⁾ It is certain that with regard to strīdhana there is nothing correlative to the coparcenary system as applicable to male's property;⁽⁴⁾ hence, partition of strīdhana during the life-time of the owner is not conceivable. But in any case the import of Devala's text cannot be stretched, as has been done by the commentators, to establish this point. The reference made by Mitra Miśra to the theory of right by birth is especially irrelevant and paranthetical.

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- (1) "Anenāpi strīdhane sutādīnām nāsti svāmyamiti gamyate. Tataścha strīdhane jīvad vibhāgo nāstyeva stryaikasvāmika-tvāt." - Smr.Cha.659. See also Smr.Cha.660 infra p.363.
- (2) Smr.Cha.659; Vi.Mi.546. The idea seems to have ^{been} taken from the debts of the father which are payable by the sons, grandsons and great-grandsons.
- (3) Vi.Mi.546 - "Anena strīdhane jīvantyām tasyām sutānām janmanā svatve'pi nāsti vibhāga iti gamyate."
- (4) But see infra pp.566-69.

The next question to be considered is whether the status of a woman affects her right of disposing of her strīdhana. There can be two types of distinctions amongst women : firstly, that between chaste women on the one hand and unchaste women including prostitutes and other profligate women on the other; secondly, between unmarried women, married women under coverture, and widows. Legal provisions concerning unchaste women and their strīdhana will be discussed below. Our immediate task is to examine the effects of the distinction of the second type.

According to Nārada's text⁽¹⁾ it appears that a woman does not possess complete control over her property during any of the three stages of her life, that during each of these stages there would be some relative who would be entitled to supervise over her alienations and that in the absence of any such relative the King has a right to control her alienations. Manu also declares her position to be perpetually subservient.⁽²⁾ But it is reasonable to hold that the father is allowed to control his daughter only during her minority since he is enjoined by the ^{later provisions of the} Śāstra to dispose of the girl in marriage before she attains the age of puberty.⁽³⁾ The girl is allowed to choose her own husband

(1) Na.Smr.I.32 and Na.Smr.I.26-27 referred to supra pp. 221-22.

(2) Manu V.148 supra (Jha's edition V.146).

(3) See supra p.39.

(svayamvara) upon the termination of three years after she has attained the age of puberty which, according to Medhātithi, is twelve.⁽¹⁾ Incidentally it may be noted, that Kauṭilya says that a woman becomes capable of looking after her duties (vyavahāra-yogya) at the age of twelve - actually four years earlier than man - after which age she is to be fined for non-performance of her duties.⁽²⁾ It is therefore proper to hold that the girl can become capable of managing her own property at the same age at which she is theoretically allowed a svayamvara. The very fact that Manu orders the girl wishing to choose her own husband to return all the ornaments given by the father, mother or brother⁽³⁾ shows that at that time she is to assert her own position free from the symbols of her dependence. She is not allowed both to assert her own freedom and also to take the ornaments which are given probably under an expectation that they would pass under the control of some person whom the parents etc. would approve as a husband for her.⁽⁴⁾

(1) Medhātithi on Manu IX.91.

(2) Kau.III.3 Shama Śhastrī's edition p. 154 , and Gaṇapati Śāstrī's edition vol. II p. 19.

(3) Manu IX.92. Medhātithi adds that if they have given the ornaments with notice of her intention to make a svayamvara she need not return them.

(4) This mentality on the part of the parents is aptly expressed by Medhātithi on Manu IX.92 : " ... asmai na vayamenām dāsyāma ityevamabhiprāyaṃ yadbhuṣaṇaṃ ...". The svayamvara is evidently an assertion of the daughter's own independence. Rāghavānanda commenting on the verse says : "Grahāṇe stenatvaṃ yataḥ svayamvarā svadehamātramādaya varam patim vṛiṇīte tasyāḥ pitridhane nādhikārah." From the underlined words it appears that the daughter 'recovers herself only' from the father.

There is also the authority of the commentators for holding that the father loses his dominion over his daughter after she attains majority. Commenting upon another verse of Manu, Medhātithi observes that after she has attained majority the father loses his dominion.⁽¹⁾ Rāghavānanda commenting on the same verse says that the daughter's state of being a daughter (kanyāṭva) and the father's ownership (svatva) in her determine after the age of puberty as the daughter, after having "taken possession of herself" marries the bridegroom when she wants to marry of her own accord.⁽²⁾ So he considers the age of puberty of the daughter as the cause which puts an end to the ownership (svatvanivartakahetu) of the father. Kullūka also makes a similar comment upon the verse. Thus it is clear that according to the Śāstra an unmarried woman becomes fully independent in case she is not married at puberty. There is no reason, therefore, why she should be hindered in the disposal of her own property at her own pleasure. So long as she chooses to remain unmarried the

(1) Manu IX.93. Here he refers to Manu V.148 and remarks :
"Vayontaraprāptau vedayituḥ pituḥ svāmyaṃ nāsti....".

(2) "Rituparyantaṃ kanyāyāḥ kanyāṭvaṃ pituḥ svatvaṃ cha yataḥ svayamvarā svadehamātramādāya varam varayatīti pitrādya-nadhīnatvaṃ bālye piturnirdeśe tiṣṭhedyukteḥ dasavarṣā-dikālasya svatvanivartakatvādṛitukālasyaāpi svatvanivartakatvāt." It is to be noted that Medhātithi uses the word 'svāmya' whereas Rāghavānanda uses 'svatva'. Kullūka says : "...svamitvāt hiyate". But see the argument of Jagannātha noted in Banerjee pp.372-73. However, Banerjee does not try to meet that argument with the above-mentioned authorities.

Śāstra clearly does not intend to put her under anyone's control.

During coverture, however, the woman is placed by the Śāstra under her husband's control and we have seen that according to the Benares school, the Bombay school, and the Southern school her right of disposition of her non-saudāyika is subject to the control of the husband. Her saudāyika, however, is always at her absolute disposal. According to the Bengal school whatever property can be regarded as her strīdhana is at her absolute disposal. This is, of course, subject to the husband's right to take possession of strīdhana in case of famine etc. No instance of provision is to be found in the commentaries regarding the consequences of an alienation by a woman of her saydāyika strīdhana when the husband has taken possession of the property under the allowable exceptional circumstances but has not already utilised the same. But since Mitra Miśra asks the husband to repay the utilised strīdhana if he is capable of doing so,⁽¹⁾ it appears that what the husband gains under such circumstances is simply the disposing power in such strīdhana and not the right of ownership in it.⁽²⁾ Since the wife's right of ownership in saudāyika and her disposing power over it are antecedent in time to the acquirement of disposing power by the husband an alienation by the wife effected before the exercise of this disposing power of

(1) Supra p.230.

(2) But Mitra Miśra thinks that the husband gets also ownership in such property - see supra p.234.

the husband must be held to be valid. This proposition, of course, proceeds upon an assumption that at that time the disposing powers of both the husband and wife are concurrent as there is nothing in the Śāstra to suggest a position to the contrary.

During widowhood a woman returns to her original position before marriage. As the leading commentators of all the Mitākṣarā sub-schools do not mention any except the husband as having a controlling power over woman's alienations, and since they mention the husband alone as being capable of utilising strīdhana in case of calamity it is obvious that the son etc. are not entitled to the dominant position which the husband possesses.

Consequently the woman is free to dispose of her strīdhana at her own pleasure during her widowhood. Devaṇṇa particularly mentions that the son etc. have no right of dominion over strīdhana.⁽¹⁾

As a result of this, wealth earned by women and gifts given to them by strangers - whether such property is acquired by the woman before or after her widowhood - will be at the absolute disposal of a widow according to the Benares school and that part of the Bombay province which is governed by the Mitākṣarā in preference to the Mayūkhā.⁽²⁾ According to the Bengal school, the Southern

(1) Smr.Cha.659 supra p.226.

(2) Bālabhaṭṭa on Yaj.II.144 p.255 actually makes a suggestion to that effect. See supra.

school, the Mithila school and the Mayūkha such property is not strīdhana at all⁽¹⁾ and therefore the question whether such property if acquired during coverture, can be freely disposed of by a woman during her widowhood or not does not arise at all.⁽²⁾ However, it appears that even according to these schools if such property is acquired by a woman during her widowhood it would remain at her absolute disposal as there is none who can exercise dominion over it at that stage.

The relationship between ownership and the right of disposition being very complicated we have already seen that the commentators are not able to explain satisfactorily why the husband gets the right to dispose of property which is not owned by him. But to examine whether such a provision is consistent with the cannons of the Śāstra or not we have to turn to Mīmāṃsā which admittedly constitutes one of the basis of Dharma.

Although the law-givers of the Hindus do not define property they define the modes of acquisition of wealth.⁽³⁾ Commentators like Vijñāneśvara and others, however, maintain that the modes of acquisition as given by the Śāstra are not exhaustive

(1) See supra pp.90,97.

(2) Banerjee, however, boldly asserts that according to all schools the two categories of property becomes strīdhana of a woman during her widowhood. But we have already seen that those categories constitute the husband's property according to the later authors of the Bengal school. The position of Madanasimha, Devanṇa and Nīlakaṇṭha is not much different from them. See supra p.208.

(3) See supra pp.35-36.

and that they are to be supplemented by the modes of acquisition which are accepted and practised by the people themselves.⁽¹⁾

Bhavanātha who is quoted in the Madanaratna and other treatises clearly states that like treatises on grammar etc. modes of acquisition have, for their authority, the usage of the people themselves (lokasiddha).⁽²⁾ Here again it ought to be noted that Prabhākara as quoted in the Mitākṣarā and other treatises enunciates that it is the acquirement of the property which gives the acquirer an ownership in the acquired property.⁽³⁾

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- (1) Vijñāneśvara maintains that 'svatva' (ownership) is laukika (secular) and not 'Śāstraikasamadhigamya' (to be determined with the help of the Śāstra alone) - see the Mitākṣarā introduction to the chapter on inheritance p.197; see also Mad. Rat.324; Nri.Pra.212; Sa.Vi.396; Vi.Mi.418 etc. Thus Vijñāneśvara and Pratāpa Rudra, for instance, add 'ādhi' and 'kuttā' as additional modes of acquisition - see above pp.36.
- (2) "Lokasiddham vārjanam janmādi, ata evānidamprathamalokadhīviṣayatayā sthite nibandhanārthā smṛitirvyākaraṇādi-smṛitivat iti." - Mad.Rat.324; see also Vi.Mi.420 where the reading is slightly different; "Ata evanindyaṁ prathamalokadhīviṣayavyavasthitam...." Madanasimha concludes 'arjanam svatvahetuḥ'. The point is that just as grammar comes into existence after the rules of the language have been fairly ascertained and settled by the usage of the people speaking that language the Śāstra gives nothing but a mere paraphrase of what has been accepted by the public as a correct mode of acquisition.
- (3) "Pralapitamidaṁ kenāpi 'arjanam svatvaṁ nāpādayati' iti vipratīṣiddham" - quoted in the Mitākṣarā introduction to the chapter on inheritance p.198; Vi.Mi.427 etc. The words in the single inverted commas are quoted by Medhātithi also - Medh.on Manu VIII.416. From the way Vijñāneśvara refers to Prabhākara as 'guru' it appears that he was of the Prābhākara and not of the Bhāṭṭa school. On the point of 'laukikatva' of the modes of acquisition, however, there was no difference of opinion between the two schools - see Vi.Mi.422.

The right of disposition also has been considered by the Mīmāṃsā and Jaimini lays down the following rule in respect of it : "One has the disposing power of that only of which one is the owner, other things not being within one's competency."⁽¹⁾ This shows that ownership in a thing is an essential pre-requisite for its disposal.⁽²⁾ Bhavanātha also points out that a thing which is acquired by a person is capable of being freely disposed of by him.⁽³⁾ Madanasimha and Devaṇṇa point out that this right of free disposition is, of course, subject to the precepts and restrictions of the Śāstra which makes some expenditure obligatory and declares some property to be inalienable so that property (svam), according to these authors, does not mean something which is freely to be disposed of but indicates that which is capable of being freely disposed of by the owner.⁽⁴⁾ Devaṇṇa and Mitra Miśra say

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- (1) "Yasya vā prabhuḥ syāditarasyāśakyatvāt." - Jai.Su.VI.7.2. For references to this sūtra see also Sarkar's T.L.L.(1905) p.344 and Dr.Kane's Notes to the Vya.Ma.92. In writing these few pages on the Mīmāṃsā view about ownership Dr.Kane's notes to the Mayūkha have been of valuable assistance to the present writer.
- (2) Śabara comments on the above sūtra as follows : "Yasya prabhutvayogena svatvaṃ tadeva deyaṃ, netarat. Kasmāt? Prabhutvayoginaḥ śakyatvāt, itarasya cha āśakyatvāt." Sarkar mentions many other inferences derived by later authors from the above sutra. Many of them appear to be debatable. - See T.L.L.(1905)p.345.
- (3) "Tachcha tasya tadarhaṃ yadyenārjitam" Bhavanātha quoted in Smr.Cha.602; Mad.Rat.325; Vi.Mi.422.
- (4) Madanasimha says : "Na cha yatheṣṭaviniyojyatvaṃ svatvamiti brūmaḥ kiṃ tarhi yatheṣṭaviniyogayogyatvaṃ." He says that the Śāstra controls the way of expenditure when, for instance, it makes it an obligatory duty for one to provide maintenance for one's own family. - Mad.Rat.325. Similar remarks appear in Smr.Cha.602 and Vi.Mi.422. Madanasimha and Devaṇṇa depend

(continued)

that although the husband has no ownership in his wife's strīdhana he gets an exceptional right of disposing of it because he has ownership in the wife herself.⁽¹⁾ Whether such position is tenable or not must be examined with the help of the Mīmāṃsā.⁽²⁾

Śabarasvāmi takes the opportunity of discussing this point while commenting on the Viśvajityādhikaraṇa of the Jaimini-sūtras.⁽³⁾ The point which is considered is whether in a Viśvajit sacrifice, in which the Vedas enjoin a person to give away all his property (sarvasva lit. all one's own), a person can give away his own mother, father etc. The prima facie view is that they can be given away as the mother etc. are also denoted by the word 'sva' (one's own); but the conclusive view⁽⁴⁾ is that they cannot be given away since a person has no ownership (prabhutva) in them.

Nīlakaṇṭha and Pratāpa Rudra especially take this adhikaraṇa into consideration while discussing the question under consideration. It is necessary to follow Nīlakaṇṭha's discussion in detail.

upon the authority of Pārthasārathi Miśra (Tantraratna, Sarasvati Bhavan Series part I p.19) and Dhāreśvara respectively to establish this point. Devaṇṇa says that there is actually nothing, therefore, which is freely alienable - "...yatheṣṭaviniyojyaṃ kimapi nāstīti." - Smr.Cha.602. See also Dr.J.D.M.Derrett : An Indian Contribution to the Study of Property B.S.O.A.S.(1956)475 at 481.

- (1) See supra.
- (2) Because Mīmāṃsā is one of the fourteen authorities of Dharma - see supra pp.6-7.
- (3) On Jai.Su.VI.7.1: "Svadāne sarvamaviśeṣāt" Śabara says "Idamāmananti Viśvajiti sarvasvaṃ dadatīti. Tatra sandehaḥ kiṃ yāvatkiñchit svaśabdenochyate yathā mātā pitā ityevamādyapi sarvaṃ deyaṃ, uta yatra prabhutvayogena svaśabdah taddeyamiti."
- (4) See supra p.247. note no.1.

Elucidating his point that a mode of acquisition has for its authority the sanction of the public and not of the Śāstra Nīlakaṇṭha says that this is how ownership is acquired in a calf born of a cow belonging to oneself although the Śāstra does not mention this kind of acquisition at all.⁽¹⁾

The objector says that if one gets ownership in a calf born of one's own cow, to be sure one would ^{get} ownership in a son, daughter etc. born of one's own wife and one would be obliged to give them away in the Viśvajit sacrifice.⁽²⁾ The same objector, however, further points out that ^{this} position is untenable since it would be in conflict with another Mīmāṃsā-sūtra which forbids a person to give away his son, daughter etc.⁽³⁾ Nīlakaṇṭha cuts the root of this argument by saying that a person has no ownership in a wife as he has in his cow. He further adds that the cause of ownership in a particular thing is known in this world to arise from the fact that it is a produce of something which has already been an object (āspada) of ownership.⁽⁴⁾

(1) "Evañcha svīyagavādi jātavatsādaḥ svatvavyavahāraḥ saṅgachchate. Upāyānām śāstragamyatve tu na syāt. Svīyagavādi janānarūpopāyasya śāstreṇābodhanāt." - Vya.Ma.92.

(2) According to the Śruti passage referred to by Śabara - see

P.249 note no.4 continued :

subject it means 'ownership'. 'Āspada' means receptacle or abode. Now the cow in this illustration is the object of 'svatva' whereas its owner would be considered as the subject of 'svatva'.

The objector goes on to say that a person has ownership even in the wife because in a marriage ceremony there is an 'acceptance' (pratigraha) of the wife.⁽¹⁾ Nīlakaṇṭha points out that these words of gift (dāna) and acceptance are used in the case of adoption also.⁽²⁾ He further argues that as the Kṣatriyas also follow the Brāhma form of marriage⁽³⁾ and as they are also entitled to adopt and to be given in adoption, the words gift and acceptance will have their primary meaning in the case of the Brāhmaṇas (who alone are entitled to acquire property by 'acceptance') and a secondary meaning in the case of the Kṣatriyas etc. And this is undesirable since an injunction cannot have two conflicting senses at the same time (yugapadvṛittidvayavirodha).⁽⁴⁾ He concludes therefore on

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- (1) See Āsvalayana's Gri.Su.I.6.1 and I.7.3 for gift and acceptance of the bride in the brāhma form of marriage - referred to by Dr.Kane in his Notes to the Vya.Ma.92.
- (2) Yaj.II.133 referred to in Vya.Ma.92.
- (3) Vya.Ma.92-93.
- (4) The whole discussion arises because according to Gautama only Brāhmaṇas are capable of acquiring ownership by 'acceptance' - see supra p.35. So the same words cannot be taken to have a primary sense in the case of the brāhmaṇas and a secondary sense in the case of the Kṣatriyas etc. A word is supposed to have three possible functions (vṛitti), namely, abhidhā, lakṣaṇā, and vyanjanā. The first conveys the primary sense of the word. The second function conveys the secondary or the metaphorical sense of the word but this is possible only in a case where the primary sense of a word becomes understandable. The third vṛitti conveys a suggestive sense of the word which, in any given case, may be present in addition to either of the first two vṛittis. For different functions and meanings of words see Mammata's Kāvyaaprakāśa Ullāsa no.2, Viśvanātha's Sāhityadarpaṇa p.7. See also Dr.Kane's notes to Vya.Ma.92. As the conflict exists between the first two senses the same word cannot have both the senses at the same time. See Śabara on Jai.Su.III.2.1, I.4.8 etc. as quoted by Dr.Kane in his notes to Vya.Ma.92. See also Sarkars T.L.L.(1905)p.354 for the maxim : "Sakṛiduchcharitaḥ śabdaḥ sakṛidevārthaṃ gamayati" (a word uttered only once conveys only one meaning). Also infra p.38

the authority of the Amarakośa that the adjective 'own' as found in the words like one's 'own father' etc. denotes nothing but relationship and that this idiom (śabdavyavahāra lit. linguistic usage) does not convey an idea of ownership.⁽¹⁾

Nīlakaṇṭha unfortunately appears to be the only author who repudiates the idea that a person has ownership in his wife. Almost all other authors are of the unanimous opinion that a person has ownership in his wife and such authors include Vijñāneśvara, Devaṇṇa, Madanasimha, Pratāpa Rudra, Mitra Miśra etc. though none except Pratāpa Rudra discusses the purport of the Viśvajityādhikaraṇa.

Thus Vijñāneśvara commenting on the smṛitis which forbid a person from giving away his wife or son says : "The purport of this is to convey the 'incapability of being given' but not to state an absence of ownership in them."⁽²⁾ Moreover at another place he treats the wife herself as 'wealth' on the authority of a smṛiti passage "One who snatches away the wife of a person (in fact)

(1) See Amarakośa III.3.212 referred to in Vya.Ma.93. The reading 'svo striyāṃ dhane' as found in Dr.Kane's edition is a misprint which is terribly misleading. It should be 'svo' striyāṃ dhane'; for according to the Amarakośa 'sva', when not of the feminine gender, denotes property. See Mr. Gharpure's edi.p.41 which reads correctly.

(2) Mit.on Yaj.II.175. Here the author refers to Nārada's verse containing the list of things which are inalienable and remarks "Etadadeyatvamātrābhiprāyeṇa na punaḥ svatvābhāvābhiprāyeṇa. Putradārasarvasvapratīśrūteṣu svatvasya sadbhāvāt." "Svam dadyādityanena dārasutāderapi svatvaviśeṣeṇa deyatvaprasaṅge pratiśedhamāha 'dārasutādrīte'."

snatches away his wealth."⁽¹⁾ Thus according to the Mitākṣarā the wife is the property of her husband.

Devanṇa quotes Bṛihaspati who declares that joint family property, mortgaged property, son, wife etc. are incapable of being given.⁽²⁾ Devanṇa, however, admits that though the other things declared by Bṛihaspati like mortgaged property etc. are incapable of being given on account of the absence of ownership in them the wife etc. are 'adeya' only because of a smṛiti text to that effect (i.e. vachanabala). He clearly states that a person has ownership in his wife.⁽³⁾ He adds that as penance is prescribed for, and a fine is imposed upon, a person who gives adeya, the act of giving does not create a valid gift and that the ownership of the alienee

- (1) Mit.on Yaj.II.51 : "Rikthaśabdena yoṣidevochyate. 'Saiva chāsyā dhanam smṛitamiti' smaraṇāt, 'Yo yasya harate dārānsa tasya harate dhanam' iti cha. The first quotation is Na.Smr. IV.22 & Na.Sam.II.19. The second quotation is not found in the smṛiti of Nārada as known either to Asahāya or Bhavasvāmi. But see the Dharmakośa p.704 wherein it is quoted as of Nārada apparently on the authority of Vi.Ta.520.
- (2) Bṛihaspati cited in Smr.Cha.442.
- (3) "... putradārāsarvasvāni svabhūtānyapi 'deyam dārasutādrite, nānvaye sati sarvasvam' ityādīdānanīṣedhakasmṛitibalāt adeyāni. Ādhinyāsayāchitakeṣu tu adeyatvam svatvābhāvāditi mantavyam." - Smr.Cha.442. However, Devanṇa, though he admits husband's ownership in his wife, does not admit that the husband has ownership in his wife's strīdhana : "Strīdhanamapi adeyam svatvābhāvāt." - Smr.Cha.443. He quotes Dakṣa who declares both wife and her property to be alienable : "...dārāscha taddhanam ...yo dadāti sa muḍhātmā prāyaśchittīyate narah." Therefore, as seen above, Devanṇa shrewdly depends upon the 'vachanabala' as an ultimate authority for the husband's right to dispose of his wife's strīdhana.

does not arise in the case of such property. He also says that the acceptance of an 'adeya' should be reversed by the King.⁽¹⁾ If we follow Devaṇṇa's logic we may conclude that if the wife herself is 'adeya' her property of which she herself is the cause (kāraṇa), would be equally inalienable by her husband.⁽²⁾

While considering the topic of the Viśvajit sacrifice, Pratāpa Rudra admits that a person has ownership in his wife, son etc. but argues that they are not to be given; for they are 'adeya' and hence there can be no cessation of ownership in them and the gift does not bring about an ownership of the alienee.⁽³⁾ He emphatically states, moreover that such ownership is manifested by the relation of an acquirer and the thing acquired which exists

- (1) "Grihīṭasya cha parāvartanamapi mahīkṣitā kāryamityadattādeya-grahaṇāt gamyate, adattenādeyena cha dānasiddhyabhāvāt parasvatvānutpatteḥ." - ibid. Pratāpa Rudra quotes this opinion of Devaṇṇa and agrees with him. However, as against Vijñāneśvara, Kulārka (Aparārka ?) and Devaṇṇa he agrees with Lakṣmīdhara in holding that the prohibition against alienation of all property (sarvasva) is textual and obligatory (vaidha) - See Sa.Vi.281.
- (2) Incidentally it may be noted that if we cast a casual glance at the chapter on the 'dattāpradanika' in any of the digests it appears that the list of 'adeyas' include categories of property which is inalienable by men only; this is probably so because the Śāstra, as pointed out by Nārada, hardly expected women to indulge in any kind of transactions concerning property.
- (3) Supra p.214. note 5. . See also Sa.Vi.278 "Putradārādiddra-vyasya tu dāne kṛite api svatvasyānapāyāt. Svatvaṃ mānasikā kriyā saṅkalparūpatayā nāpaiti. Kintu mahāpātakādīnā tadgatam svatvamapaitīti dhanārjananayasiddham." This view and the one quoted in the next note have been introduced by Pratāpa Rudra as being adopted by 'some people' but as he does not contradict them we may assume that he believed them to be tenable.

between a person and his wife, son etc.⁽¹⁾ Nīlakaṇṭha has very successfully rebutted this argument, it being inconsistent with the rules of the Śāstra itself.⁽²⁾

Although most of these commentators accept the position that the wife, the son etc. are inalienable Kātyāyana who has been quoted by a number of commentators states that they are not to be given away if they are unwilling.⁽³⁾ Moreover, as against Nārada,⁽⁴⁾ he also authorises a person to give away his wife and son in case of calamity.⁽⁵⁾ Quoting the first verse Vāchaspati Miśra says that according to Kātyāyana the wife, the son and other dependents

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- (1) "Putradārādau tu arjyārjakasambandhabhāvarūpasya svatvasya vidyamānatvāt. Putradārādikaṃ svameva. Tachcha mātṛpātākādīnā nivartata ityuktaṃ prāk - Sa.Vi.280. But he then remarks : "Prakṛite tu dānavichāro dānaviṣaya iti tatrāsmāka-manāsthā."
- (2) See supra.
- (3) "Vikrayaṃ chaiva dānaṃ cha na neyāḥ syuranichchhavaḥ/ Dārāḥ putrāścha svarvasvamātmanaiva tu yojayet//" - Kātyāyana quoted in Vi.Mi.307 etc. See The Dharmakośa p.804; Kane's edi.no.638.
- (4) Na.Smr.VII.4-5 & Na.Sam.4-5 wherein Nārada forbids alienation of wife etc. even during distress. See Mit.on Yaj.II.175 for a discussion about this verse.
- (5) "Āpatkāle tu kartavyaṃ dānaṃ vikraya eva va/ Anyathā na pravartanta iti śāstraviniśchayaḥ//" - Kātyāyana quoted in Smr.Cha.307 etc. See The Dharmakośa p.804. Devaṇṇa notes the contradiction between this text and the above-mentioned text of Nārada but does not try to resolve the contradiction as regards the alleged alienability of the wife. He and Mitra Miśra compare the two quotations of Kātyāyana just referred to and say that the epithet 'unwilling' in the first verse refers only to circumstances where no calamity exists; for in case of calamity the sale or gift is authorised - Smr.Cha.446; Vi.Mi.307; see also Pa.Ma.226.

could be given away in case they are willing.⁽¹⁾ It is more probable therefore that in the beginning the wife was considered as an alienable property of the husband though it appears that this right was in fact not exercised very frequently even in the remote past.⁽²⁾ With the advent of the concept of *strīdhana*, it seems that this right to alienate the wife herself in calamity was eventually curtailed so that all that remained was a right to alienate the wife's *strīdhana* in case of calamity. So although the idea of the alienability of the wife had been discarded the idea of ownership in one's own wife lingered as has been evidenced by the opinion of *Vijñāneśvara* and others. The stand taken by these commentators is, however, self-contradictory for these very commentators declare women themselves to be entitled to own property and logically speaking it is impossible to imagine that a thing could be both a subject and an object of ownership.

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- (1) "Āpatkāle api putradārādyanvayānām vimatau putradārāsarvas-vānāmadeyatetyarthah. Tatsammatau deyatāmāha Kātyāyanah 'Vikrayam chaiva ...' 'Āpatkāle tu kartavyam ...'. Teṣām trayāṇām vimatāvetattrayaṃ svayamevopabhoktavyam, eteṣāmanumatau param teṣām dānamityarthah." - Vi.Chi.36.
- (2) In the legendary history of India two instances are very spectacular on this point. In the *Mahābhārata* the king *Dharmarāja* is shown to have successfully offered his wife as a gambling-stake notwithstanding the opinion of his brothers to the contrary. In the *purāṇas* King *Hariśchandra* who gave all his property to the sage *Viśvāmitra* is told to have lost his ownership in his wife as well. Such instances, however, can hardly be treated as representative of general social practice; for in the *purāṇas* even lord *Kṛiṣṇa* is stated to have been gifted away to the sage *Nārada* by his wife though in fact no other instance of such '*patidāna*' has been found either in literature or^m the inscriptions.

From a Mīmāṃsā point of view we may conclude that the husband has no right at all to dispose of his wife's strīdhana because he has no right of ownership in it. From the Mīmāṃsā standpoint therefore the explanation given by Devaṇṇa, namely, that the husband gets this exceptional right because he has ownership in the wife herself, is without any foundation. This also reveals the self-contradiction involved in the stand adopted by Mitra Miśra and Jimutavahana, namely, that a woman has ownership in wealth acquired by her and property given to her by strangers but that her husband has full freedom to dispose of such property. Jaimini emphatically states the right to dispose of a particular property cannot exist by itself and as apart from the ownership in that property.⁽¹⁾ It is unlikely that the commentators were, while segregating the right of disposition from the right of owning strīdhana, unaware of the fact that they thereby were violating the basic Mīmāṃsā principles. We are therefore driven to the inference that they deliberately acted against Mīmāṃsā only to incorporate into their treatises the provisions which were more consistent with the usage which existed in derogation of the Śāstra itself.

(1) Similarly the stand of the Bengal school, namely, that such property devolves upon the heirs of the husband is also without any footing. To borrow the argument of Mitra Miśra arising in another context : "Vastutastu jātasvatve svāmini mṛite tatpratyaśannānāmeva taddhanagrahaṇamuchitaṃ." - Vi.Mi. 492.

After this review of the Dharmaśāstra's provisions on the subject of a female's disposing power over her "peculiar property" we may now turn to the current text-books and judicial decisions given during the British period and thereafter endeavour to ascertain whether, and if at all, to what extent, they have faithfully reproduced these provisions, or any of them.

In the first quarter of the nineteenth century women were, on account of their supposed perpetual dependence, always considered by the Courts as a privileged class which, as against designing relatives, required the protection of the Court. They were not considered to be *alieni juris* and were viewed as hardly capable of acting on their behalf. The attitude adopted by the Courts in those days may be illustrated by the following remark of the Supreme Court of Madras in *Narasummal v. Luchmana* :-

"It is a distinguishing feature in the case, that the complainant is a 'native woman'. As such there can be no hesitation in declaring her to be under the special protection of the Court, entitled to the benefit of that principle which, in equity, subjects to be regarded with peculiar jealousy, all transactions with persons, whom the policy of law considers to be, at the time, incompetent to maintain their own rights, and to exact justice for themselves. A native woman can never be deemed to be sufficiently *sui juris*, to be held bound by her personal acts, if there exists the slightest reason to apprehend that an advantage may have been taken of her."(1)

This doctrine of the dependence of women, however, proved to be a double-edged weapon in the Courts : it served to protect

(1) (1809) Notes of Cases by Strange II.15. For similar remarks see also *Latchemy v. Lewcock* (1800) Notes of Cases by Strange I.30 at 35 and *Chellumal v. Garrow* (1812) Notes of Cases II.153. The statement that women can scarcely be called *sui juris* is contrary to the provisions of the Śāstra. See below.

women from being deceived by vicious people; but it also had the effect of limiting the estate which women took in their property.⁽¹⁾ It was this principle that, at least for the time being, misled the Court into believing that women could not have an absolute power of disposing of even their *saudāyika strīdhana*.⁽²⁾

The subject of women's right of disposal of their *strīdhana* received a somewhat neglectful treatment at the hands of the early text-book writers. To take the example of the three earliest authors, Sir Francis Macnaghten denotes only a couple of pages to the whole topic of *strīdhana*. After having dealt with the meaning of *strīdhana* and the line of devolution prescribed for the same, he tries to account for his haste by saying "The subject is one more of curiosity than of use, for it rarely happens that women die possessed of wealth."⁽³⁾ It is not surprising therefore that he deals with the question of the right of disposition within a single sentence.

Sir William Macnaghten fares no better.⁽⁴⁾ It may, at the outset, be mentioned here that this author had strange juridical theory of his own. In his opinion the question as to what the law

(1) This was one of the reasons why women were declared to be entitled only to limited estate in inherited property.

(2) See below pp. 263-64.

(3) Consideration on the Hindoo Law (1824) p. 9. Although Sir Francis limits the title of his book by adding a clause "as it is current in Bengal" it must be remembered that the Court at Fort William, in those days, had to deal with appeals from many districts governed by the Mithila and the Benares schools as well. So the author can hardly be excused for having neglected to treat at length the law of the *Mitākṣarā* sub-schools on this point.

(4) Principles and Precedents of Hindu Law (1829).

is is not as much important as the question whether the law is certain or not.⁽¹⁾ In haste to make the law certain Macnaughten has made many statements which are unsupported either by the Śāstra or by custom.⁽²⁾ He devotes one paragraph to the woman's right of disposition which is as follows : "It may here be observed, that the Hindu law recognises the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. He has nevertheless power to use woman's peculium, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property."⁽³⁾ The statements made in the underlined two sentences are obviously self-contradictory, and defeat the very purpose of the treatise, namely, to make Hindu law certain and precise.

(1) "It has been my object in this work, to fix doubtful points regarding which a contrariety of opinion has hitherto prevailed;... . Though I have satisfied myself, I am aware it by no means follows that others should be convinced with the same facility : but it is certainly true, that questions of highest importance, and which are of everyday occurrence, should be finally determined in one way or the other. The mode is nothing:- the determination is everything. It matters little, for instance, to a community at large, whether a father shall be held to have the right of conferring his ancestral real property on one son, to the exclusion of the rest; but it is of highest importance to every member of the community that the rights and the privileges of each should, as far as practicable be defined as established - Introduction to Macnaughten's Hindu Law pp.III-IV. He further states that the Hindu law "in its pure and original state does not furnish many instances of uncertainty or confusion. The speculations of the commentators have done much to unsettle it and the venality of the pundits has done more."

(2) See *supra* p.123 for another instance.

(3) Mac.H.L.vol.I.p.40.

Mr.Gupte, a modern author, also makes a similar mistake. After having stated that strīdhana is the absolute property

Sir Thomas Strange devotes more space to women's right of disposition.⁽¹⁾ He is the first author who, for the purpose of disposition, distinguishes between wealth earned by women and gifts given to them by strangers (which he mistakenly includes in strīdhana on the alleged authority of the Smṛitichandrikā) on the one hand and the rest of strīdhana on the other.⁽²⁾ As regards the former division of woman's property he states that according to "the most general understanding" such property is at the disposal of the husband "without reserve."⁽³⁾ As regards the latter he says that the husband "has universally with her so far a con-current power over it, that he may use it in any exigency, for which he

of a woman and having affirmed that absolute property is that which is at the free disposal of the owner Mr. Gupte sets out the limitations put upon women's power of disposition of strīdhana as - exceptions to the above rule. But an exception cannot exclude the very differentia of strīdhana which the author has created for the purpose of his definition of strīdhana. See Gupte's Hindu Law pp.565-66 and compare them with the later pages. The author is probably impressed by the apparent construction of Gour's Hindu Code s.341 - Compare s.341 of the code with Gour's remark on p.1565.

- (1) Sir Thomas Strange : Hindu Law (1830) pp.26-28.
- (2) See ibid vol.I pp.29-31 wherein the enumeration of strīdhana is given wholly on the authority of the Smṛitichandrikā which, according to Strange, includes all kinds of women's property in strīdhana. The statement that 'śilpaprāpta etc.' is strīdhana according to the Smṛitichandrikā is of course not correct. See supra p.97. It seems Mayne has followed Strange in making a similar statement - see infra p.276. Strange's full reliance on the Smṛitichandrikā shows that both Macnaughten and Strange borrowed their ideas about Hindu law from the schools of the territory where the Courts which they presided over were situated viz. Calcutta and Madras respectively.
- (3) Ibid p.26.

has not the other means of providing"(1) and refers to the texts about famine etc.(2) which, according to the Śāstra, create such an exigency. It is not certain whether even Strange had a definite idea about the extent of women's right of disposing of their own strīdhana. For after having stated that, women being uneducated, "gross abuse" is to be controlled by the father, the husband or the guardian etc. he adds a clause : "such interference being itself subject to revision by the judicial power, since otherwise the idea of strīdhana would be but a mockery."(3) The last clause suggests that even according to Strange women have in their strīdhana some special right of disposition which they do not possess in other property. His statement that even the father and the guardian etc. are able to control alienations by women is misleading; for none except the husband has a right to do so. His suggestion about judicial revision is, however, important though it does not appear to have been taken notice of by any other text-book writer or by a Court of law.

Thus none of these writers seems to contemplate woman's absolute right of disposition in any kind of strīdhana - a policy which, amongst the commentators of the different schools, has been adopted by none except Vijñāneśvara. The fact that according to Vijñāneśvara women cannot dispose of any property independently has been admitted as a matter of unavoidable inference by West. J.

(1) Ibid.

(2) For these texts see supra pp.229 onwards.

(3) Strange H.L. Vo.L.p.28.

in Vijiarangam's case, by Messrs. West and Bühler and by Jolly. Though West and Bühler give the distinction between *saudāyika* and non-*saudāyika* as developed by the later authors of the *Mitākṣarā* school they confirm the attitude of *Vijñāneśvara* stated just above, on the authority of the judgement of West J. who discusses the subject at great length and rightly concludes : "It is clear, therefore, that a right of absolute disposal did not enter into *Vijñāneśvara*'s conception of the essentials of ownership."⁽¹⁾ Jolly also thinks that as regards disposition *Vijñāneśvara* wants to give the same rights to women over their *strīdhana* as to men over their ancestral property. He thinks in fact that the widening of the term *strīdhana* in the *Mitākṣarā* was neutralised by the want of independence for women⁽²⁾ - a suggestion which at once compels assent - for it shows the perfect balance of the scheme which existed in *Vijñāneśvara*'s mind. Jolly adds however, that the 'successors' of *Vijñāneśvara* have, from the point of view of woman's dominion, removed the identification of *strīdhana* with female's property in general by admitting the distinction between *saudāyika* and non-*saudāyika*.⁽³⁾

This has been stated incidentally in order to show that

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- (1) A piece from the judgement of Vijiarangam's case (supra pp.152. quoted with approval in W. & B. p.303.
- (2) Jolly's T.L.L.1883 p.252. The analogy suggested by Jolly is really interesting for it throws some light on the fact that Manu's text (IX.199) forbidding women to expend has been applied to joint family property by some commentators and to *strīdhana* by some others. See supra pp.222-223.
- (3) T.L.L.(1883) p.259.

the narrow concept of woman's dominion over her strīdhana as stated by Macnaghten or Strange coincides with the idea of Vijñāneśvara alone. But the later writers such as Sirkar, Grady, Banerjee, Jolly etc. give many of the texts on disposition which have been discussed above.⁽¹⁾

We may now turn to the case-law on the topic. It will be noticed that the law concerning woman's right of disposition has been discussed more elaborately by the judges of the Bombay High Court than of any other High Court. Incidentally it was in the Bombay province itself that woman's absolute right of disposal in at least one kind of her property was recognised for the first time

Even in Bombay the theory of dependence of women hampered at first the assertion of their absolute right of disposing of their saudāyika. In Ichha Lukshumee v. Anandram⁽²⁾ it was decided by the Bombay sudur Udalut Court that a widow is entitled to the possession of her dower (pullā)⁽³⁾ but that she cannot imperatively

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- (1) Shamachurn Sirkar's Vyavasthā-Darpana (1867)p.687 onwards. This was 'a digest of Hindoo law as current in Bengal'. This may be considered as the first book in which all the law of the Bengal school was given at great length with fairly exhaustive śāstric notes^{and} references. Standish Grove Grady : A Manual of Hindoo law (1871)p.116. The later authors need not be considered here except for controvertial points as almost all of them accept the conclusions of Banerjee on vital points - see for instance Trevelyan's Hindu Law (1913)p.429; Gharpure's Hindu Law (1931)p.462.
- (2) (1814) Borr.I.114. For palla see infra pp.627-28.
- (3) It seems that the amount of palla is fixed in each particular caste though variable on account of some special reasons - see the facts of Dhoollubdas v. Brijhookandas (1818)Borr.II.423. See also infra.

demand it from her father-in-law before she attains the age of thirty because "wealth intoxicateth youth" and because she is entitled also to maintenance from her father-in-law.⁽¹⁾ In Dhooli-ubhdas v. Brijbhokandas⁽²⁾ the Provincial Court admitted that a woman has 'full power over her pulla, whether in cash or ornaments' but decided that if after the death of her husband any person who is an heir of her husband claims to maintain her he should deposit the pulla with some trustee after having given the necessary ornaments to her. Borradaile rightly points out in a foot-note that although a woman can demand maintenance from the heir of the husband it cannot be forced upon her so as to create a state of dependence.⁽³⁾

But the trend of the decisions soon changed and in Manukchand v. Premkoonwar⁽⁴⁾ it was decided that where the husband and the wife live separately by mutual agreement the husband cannot oblige his wife to furnish a security against waste of her own dower. In Wulubhram v. Bijlee⁽⁵⁾ the husband who had deserted his

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- (1) In a foot-note to this case Borradaile gives an English translation of a supposed Vyavasthā viz. 'child under 16' and 'a woman under 30' 'being under the dominion of passion' are supposed to be unfit to take charge of their property. He, however, adds : "I find no direct authority for this vyuvastha which would virtually annul the right a woman possesses over her property and exercises too, as everyday's practice proves."
- (2) (1818) Borr.II.423.
- (3) He also points out the contradiction between the opinion of the śāstris in this case and those in the case mentioned just above. For his remark see supra p.26. In Muyaram v. Govind (1822) Borr.II.245 the śāstris admitted that the ornaments given to the wife at the time of her marriage "belong to her alone and no one has a right to take them from her."
- (4) (1822) Borr.II.321.
- (5) (1823) Borr.II.440.

wife was asked to give maintenance to his wife and also to return the dower.

Although the above cases do not contain any discussion as to whether the property was *saudāyika* or not it is evident that it was *saudāyika* in each of these cases and that it was fulfilling the purpose for which it is usually given by the relatives, namely, to provide maintenance during distress.⁽¹⁾ It is to be noted that the women in all these cases were either widows or deserted wives.

After these cases the so-called technical *strīdhana* was soon recognised by the Courts as *saudāyika* and women's absolute power of disposal of it was admitted unhesitatingly. In Gosaien Chund v. Kishenmunnee⁽²⁾ the Sudder Dewanny Adawlut Court of Bengal decided that the property which a woman receives from her brother as a gift is her '*soudayica*' and that she can alienate such property by gift *inter vivos*. The text of *Nārada*⁽³⁾ prohibiting any alienation by a woman and *Kātyāyana's*⁽⁴⁾ text about *saudāyika* were discussed for the first time in this case. However, as this case was of the Bengal school once it was accepted that such property was *strīdhana* the woman's right of free and unfettered alienation should have been accepted as an inevitable corollary.

In Kullammal v. Kuppu⁽⁵⁾ the Madras High Court held that

(1) See supra p. 71. for *Kātyāyana's* verse.

(2) (1836) Mac.Rep.VI.77. Incidentally it may be noted that Halhed, who published the translation of the *Vivād-ārṇavasetu* under the name '*The Code of Gentoo Laws*', was the uncle of Halhed J. who presided over the Court in this case.

(3) Supra p. 221-22.

(4) Supra pp. 71.

(5) (1862) 1 M.H.C.R.85.

where there is no proof as to how a woman came into possession of a particular item of property, it is to be considered to be her strīdhana and to be at her absolute disposal. The ratio of this case is indeed a very broad one, namely, a woman's strīdhana is "her absolute property and at her independent disposal", "with, perhaps, the exception of land, the gift of her husband ..." and that no distinction is to be made between moveable and immoveable property held by a woman. Scotland C.J. did not consider any of the texts of the Southern school such as the Smṛitichandrikā etc.; if he had taken into consideration any such text he would never have ventured to lay down such a wide proposition.⁽¹⁾

In Luchman v. Kalli Churn⁽²⁾ it was laid down that a woman is entitled to dispose of moveable and also immoveable property purchased out of her own strīdhana. In Venkata Rama v. Venkata Suriya⁽³⁾ Mayne, as counsel for the appellant, raised a strange distinction before their Lordships of Privy Council, namely that the widow who has purchased immoveable property with the help of moveable property given by the husband, cannot dispose of such immoveable property by will and that such property follows the line of succession prescribed for her husband's property. He had, however, conceded in his arguments that the testamentary power of a

(1) All the authors of the Southern school admit, for the purpose of deciding women's right of disposition, the difference between saydāyika and non-saudāyika. See supra.

(2) (1873) 19 W.R.292 P.C.

(3) (1880) 2 Mad.333 P.C.; for detailed facts see 1 Mad.281 wherein the Madras High Court judgement is reported.

woman is equal to her power of disposition by gift inter vivos. Their Lordships of the Privy Council followed Luchman's case and rejected Mayne's contention in the following words : "Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her stridhanam."⁽¹⁾ Here it ought to be remembered that Nārada's restriction on alienation of immoveable property given by the husband has been interpreted by the commentators as introducing an exception (apavāda) to the general rule declaring absolute power of women over their saudāyika.⁽²⁾ According to the Mīmāṃsā as well as western jurisprudence an exception cannot be extended by analogy (atideśa).⁽³⁾ So when a thing does not come under the express provisions of an exception the general rule must be applied. That is why Devaṇṇa and Bālabhaṭṭa interpret a text of Kātyāyana (which is not very clear by itself) to mean that immoveable property given to a woman by any relative except the husband is freely alienable by her.⁽⁴⁾

In Nellaikumar v. Marakathamal⁽⁵⁾ it was decided that

(1) 2 Mad.333 P.C. at 335.

(2) "Svātantryāpavadaṃ darśayati." - Smr.Cha.

(3) "Apavādābhāvādutsargasthiti iti nyāyaṇ." - Nyāya Nirṇaya quoted in the Mīmāṃsākośa part I p.503. See also the Puruśārthachintāmaṇi quoted on the same page of the kośa.

(4) Supra pp.

(5) (1876)1 Mad.166. The two judges gave two different judgements and the trend of each has been slightly different. Innes J. followed Raja Chandranath Roy v. Ramjai Mazumdar (1870)6 B.L.R 303, a Bengal case, wherein it was held that such property can be disposed of by gift inter vivos. The property seems to have been considered by him as strīdhana. According to Kindersley the property, 'whether it was strīdhana or not', was to be

a woman can, by will or otherwise, dispose of any property given to her in quit of her maintenance. Similarly ornaments given by the husband were considered as a woman's *saudāyika*.⁽¹⁾ In Munia v. Puran⁽²⁾ the Full Bench of the Allahabad High Court decided that immoveable property obtained by a woman from her brother is under her absolute and unimpeachable control and disposal. The widow in this case came into possession of the property after the death of a brother. There was no evidence as to how she came into possession although it was conceded that it could not be by inheritance. It is impossible to state the exact ratio of this case as the report is somewhat cryptic and as their Lordships do not refer in their judgement to any text or previous case.

considered to be at the absolute disposal of the woman as 'she was acquitted of giving any account.' - see report at p.167.

- (1) Ornaments constitute *strīdhana* only if they are given to a woman unreservedly - see supra p.193. If they are given by the relatives of a woman they would constitute her *saudāyika*. In Emperor v. Sat Narain A.I.R.(1931)All.265 the wife whom her husband had accused of stealing golden ornaments was convicted together with a person who helped her in disposing of those ornaments. The other person had pleaded guilty under S.380 I.P.C. and therefore had no right of appeal under S.412 Cr.P.C. Similarly the wife had admitted that the property belonged to her husband. But the High Court held that a person pleading guilty owing to an erroneous conception of one's right has a right to appeal and referring to the wife's statement their Lordships remarked: "Here again the wife commits the popular blunder as to the right of ownership in *stridhan* property. The articles were given to her by the husband or by her mother and they constituted *saudāyika stridhan* under the Hindu law." If the ornaments were given conditionally they could not be regarded as *strīdhana* even according to *Kātyāyana* - See supra p.74. Moreover this is another striking instance wherein no text or previous case is quoted. Reliance has been placed solely on Mulla's Hindu Law edi.5 p.139.
- (2) (1883)5 All.310 F.B.

In the later cases it was always admitted that gifts from relatives as distinguished from gifts by strangers constitute *saudāyika* which is at the absolute disposal of a woman.⁽¹⁾ By an analogy between gift and bequest it was also admitted that property obtained through a bequest also is *saudāyika*.⁽²⁾ Thus all the so-called technical *strīdhana* was soon recognised as being *saudāyika*. Madavarayya v. Tirtha Sami⁽³⁾ was a peculiar case in which property was jointly gifted to husband and wife and this property was later on added to the property jointly purchased by them. It was held that after the husband's death his interest in the property devolved on his brother but the wife's interest therein was her *saudāyika* so as to be at her absolute disposal.

The *Smṛitichandrikā* which gives a restricted meaning of '*saudāyika*' once created a difficulty before the Madras High Court in Muthukaruppa v. Sellathammal⁽⁴⁾ wherein the learned judge Seshagiri Ayyar J. fully discussed the problem. Giving the restricted interpretation put upon the *Mitākṣarā* definition of *strīdhana* as laid down by their Lordships of the Privy Council he said : "If we

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- (1) See the later cases *infra*. *Rajamma v. Varadarajulu* A.I.R. (1957)Mad.198, a latest case on this point, this rule has been stated as an accepted position of the law.
- (2) *Venkareddi v. Hanmantgouda* (1933)57 Bom.85; *Fakirgouda v. Dyamua* (1933)57 Bom.488.
- (3) (1877)1 Mad.307. As regards the first part of the decision it must be stated that in the first place, the interest of the husband should have been held to have devolved upon his widow as the survivor between the two owners. In the second place, the brother of the husband, it appears, was a divided brother of the husband as a result of which the widow should have been held entitled at least to a limited interest in the other moiety as her husband's heir.
- (4) (1914) 39 Mad.298.

regard this restricted class as stridhanam property at the absolute disposal of woman, we can steer clear of many difficulties."⁽¹⁾ Admitting that the commentators frequently incorporated into their treatises a body of usages not strictly in accordance with the smṛitis he said that the interpretation of Devaṇṇa shows that there was an attempt in the 13th century to put restrictions upon women's power of alienation.⁽²⁾ But he further pointed out that as the Mādhavīya of the 14th century and the Sarasvativilāsa of the 16th century do not accept the views of the Smṛitichandrikā, the set back in favour of the husband's "larger power of interference over his wife's property was only temporary."⁽³⁾ He also referred to the texts of the other schools which are unanimous on this point and are opposed to the Smṛitichandrikā.⁽⁴⁾

Referring to Dantuluri v. Mallapudi,⁽⁵⁾ wherein it was observed that a woman's independent power over her strīdhana during coverture was doubtful he remarked that the judges in that case did not consider the relevant texts and that the pronouncement proceeded upon the general theory of dependence of women in India.

(1) Ibid at p.299.

(2) Ibid at p.301. He, however, remarks that the conclusion in the Smṛitichandrikā has been stated hesitatingly. The remark is entirely unfounded. See supra.

(3) Report at p.301.

(4) Ibid at p.302. Texts of all the schools have been referred to. For women's unfettered right of disposing of their saudāyika the learned judge relied upon Shamachurn Sirkar, Banerjee and 'fatvas' of the pandits published in the Vyavasthāchandrikā.

(5) (1863) 2 M.H.C.R. 360/

He further observed : "With all respect, the learned judges have not realised, that the power of disposition over property given to women under the Hindu law was greatly in advance of the views held regarding it by other civilized communities. The Hindu law deals with the dependence of women more as a right inhering in them for protection and as a duty resting upon men than as a disqualification for dealing with property."⁽¹⁾

From the reasoning of the learned judge it seems that if he had before himself the text of the *Dāyadaśāsloka* which forbids during the Kaliyuga even alienation of *saudāyika*,⁽²⁾ the decision of the case would have taken a different turn; for this treatise which is very clear and emphatic throughout was compiled at the very beginning of the British period and so well up-to-date.

The case-law concerning a woman's right to alienate immovable property given to her by her husband has been discussed in the last chapter as decisions on this point were generally given on the basis of the question whether such property was *strīdhana* or not.⁽³⁾ The gist of the finally developed law may be summed up here. Notwithstanding the restrictive precept of the *Śāstra* the husband can clothe his wife with full rights of ownership in immovable property given by himself and can thus make the gifted immovables freely alienable by her. Secondly, if it appears from a

(1) Report at p.303.

(2) See supra p.220.

(3) Supra pp.165-69.

document that the husband intended to transfer to his wife full right of ownership in such property it will be presumed that the right of alienation was also intended to be conferred upon her although it has not been expressly mentioned.

It is at once evident that the restriction which the Śāstra put upon alienation of immoveable property and the liberal interpretation put upon the restriction by the modern Courts are both reasonable each in its own way. According to Hindu law gift even of immoveable property could be effected verbally. Taking benefit of this situation a dishonest wife could at any time say that her deceased husband had gifted such and such property to her; or she could pretend that the husband, while on his death-bed, promised to give certain portion of land to her and the sons could be compelled to transfer the land as fulfilment of their father's promise.⁽¹⁾ Moreover in case of gift of immoveable property like agricultural land an immediate and actual transfer of possession to a female donee would not be invariable. Thus a designing woman could snatch the family property from the rightful claimant and could place it in the hands of her relatives in her parents' house. In the case of moveable property such a contingency could be least expected; for gift of moveable property would usually be accompanied by a transfer of possession from the husband to the wife. Such transfer of possession could be applied as a crucial test in determining whether or not a particular property is given to the

(1) See Devala's text supra p.238.

wife by her husband. Since the passing of the Transfer of Property Act, however, no transfer of immoveable property is valid unless it is evidenced by a document which is registered and attested.⁽¹⁾

When a husband makes a transfer of property to his wife under an attested document there is always a greater chance of ascertaining or inferring his intentions as to the quantum of interest he wished to confer upon his wife. Naturally when it was found that the husband could expressly relinquish his right of resumption of gift or his right to retain control over such gifted immoveables it was deemed to be necessary to amend the rule providing total denial of the right of alienation to women.

Coming to the non-technical strīdhana, wealth earned by women with their own exertions and property given to them by strangers should be considered first. Actually these two categories are not strīdhana according to the Bengal school, the Mithila school, the Southern school and the Mayūkha;⁽²⁾ but it has been declared to be strīdhana in all the Courts in India.⁽³⁾ Unfortunately there does not appear to be a single case wherein the woman's power of disposition over such strīdhana was directly called in question. According to both Jīmūta and Mitra Miśra such property is at the absolute disposal of the husband.⁽⁴⁾ Strange endorses their opinion.⁽⁵⁾ In dealing with the law of the Bengal school Grady

(1) A gift of immoveable property which is not registered and attested is void under s.123 of the T.P.Act of 1882.

(2) See supra.

(3) Supra pp. 169-72, 189.

(4) Supra pp. 109 and 82 respectively.

(5) See supra p. 260.

suggests that such property is considered to be the husband's property unless acquired during widowhood.⁽¹⁾ Mr. Gharpure states that the woman becomes absolute owner of such property after the husband's death⁽²⁾ which means that according to him during coverture she does not possess absolute right of disposal over them. The property being not *saudāyika* according to the *Śāstra* their Lordships of the Bombay High Court would definitely have adopted the same view if a case on this point had come before them.

However, Mayne observes : "The restrictions in these texts cannot be more than moral precepts any more than the restrictions on the father's power in respect of his self-acquired immoveable property. Neither the husband nor her issue have any joint interest in the property along with her. And restrictions on her powers can only be on the ground of the presumed incapacity of woman to act without her husband's permission whilst he is alive. But this incapacity is not recognised by the texts in respect of most of the species of *strīdhana*. Where a woman is the sole owner and nobody else has any vested interest in it, her absolute dominion is a necessary legal result. There can be no doubt that a husband would always be able to exercise a very strong pressure upon his wife, but cases may occur where they live apart or where she is a superseded wife, or where her husband may unreasonably withhold his assent to a proper use of her property, for instance, in favour of

(1) Manual of Hindu Law p.114.

(2) Gharpure's Hindu Law pp.462-63. But for the two inconsistent alternatives put forward by him see *infra* p.292.

her children. Very probably, the Sanskrit authorities did not intend these rules to be legal prohibitions."⁽¹⁾

Muthu Ramakrishna v. Marimuthu⁽²⁾ was a case in which the suit-property belonged to a woman who was a member of the Padayachi community amongst whom women work and earn jointly with their husbands. The defendant claimed to be a purchaser from the alleged heir of the woman whereas the plaintiff who claimed through the woman's husband maintained that the defendant had no locus standi as the property, being earned during coverture, was not strīdhana at all and that the property being the joint property of the husband and wife, it devolved upon the husband by survivorship. The District Munsiff, the subordinate judge and the Madras High Court in second appeal accepted the plaintiff's contention and dismissed the suit. When the case in its third appellant stage came before the divisional bench of the High Court, Sankaran Nair J. held, on the alleged authority of the Mitākṣarā, the Dāyabhaga, the Dāyakramasaṅgraha and the Vīramitrodaya, that such property is strīdhana and passed an order to restore the suit to the file of the District Munsiff and to make the daughter of the woman a party to the suit. Admitting, however, that the question of the woman's right of disposition did not arise at all in that case Nair J. went on to quote and approve Mayne's remark to the effect that such property is held by a woman independently of her husband and that it devolves upon her

(1) Mayne 11th ed. p. 739.

(2) (1915) 38 Mad. 1036.

heirs. As the woman in this case belonged to the Padayachi community amongst whom the husband and the wife usually work and earn together the learned judge could have treated her as one of those privileged women whom the śāstra segregates from the rest of the female society and gives full independence.⁽¹⁾

Unfortunately Mayne, upon whom the learned judge relies for his dictum, has made several incorrect statements. Firstly, he proceeds on an incorrect assumption that such property is strīdhana according to the Smṛitichandrikā and the Mayūkha.⁽²⁾ Secondly, that a woman is the sole owner of a particular property and none else has any vested right in such property does not by itself mean that the woman has absolute dominion over such property; for that is exactly where in Mitākṣarā school differs from the Dāyabhāga school in holding that saudāyika i.e. property which is at the absolute disposal of a woman does not form the sum total of her strīdhana i.e. property in which she has exclusive ownership. Thirdly, the argument that the incapacity of the woman has not been recognised in respect of "the most of the species of strīdhana" is misleading. A more correct statement, adopting a somewhat different approach, would be that saudāyika comprises that property which can be denominated as property acquired only by one of the several modes of acquisition mentioned by Gautama viz. by the acceptance of gifts.⁽³⁾ Several commentators belonging to the Benares school, the Bombay school

(1) See infra chapter V and supra p. 59.

(2) See Mayne pp. 738-39. See supra p. 260.

(3) Supra p. 35.

or the Southern school include in strīdhana property acquired by a woman by many other modes of acquisition mentioned by Gautama such as inheritance, partition etc.⁽¹⁾ But none of them ventures to say that such property is saudāyika. In ascertaining the proportion between the strīdhana which is kept at the absolute disposal of a woman and the strīdhana which is not kept at her absolute disposal, it is better to count the modes of acquisition rather than the categories of strīdhana coming under these two separate heads.⁽²⁾ Fourthly, when Mayne calls this restriction on alienation by women as a moral precept he probably wants to refer to the distinction between the mandatory rules (kratvarthavidhi) and recommendatory rules (puruṣārthavidhi) and to include the restriction in the latter category.⁽³⁾ But the distinction between the mandatory rules and the recommendatory rules is not the same as the distinction between the rules of religious behaviour and the rules of positive law - a distinction which has, for instance, been usefully utilised by Vijñāneśvara in holding that according to the positive law the nature of ownership being secular the modes of acquisition are to be determined not with the help of the Śāstra but in accordance with the established usage.⁽⁴⁾ However, for the purpose of relying upon the former kind of distinction Mayne could either resort to the Mīmāṃsā logic itself or could adduce any śāstric text in his favour, but he does not do so. In this connection he could have

(1) Supra p. 81.

(2) For these categories are not logically arranged and therefore they constitute overlapping divisions - see supra p. 62.

(3) For this distinction see supra pp. 10-11.

(4) Supra p. 35.

profitably referred to the doctrine of *factum valet* as propounded by the authors of the *Smṛitisārasaṅgraha* and the *Dāyarahasya* but even then the authority of *Durgayyā*, which would have carried more weight in this Madras case Muthu Ramakrishna v. Mari Muthu, would have gone against him.⁽¹⁾ Fifthly, it seems that Mayne treats the possibility of the capricious or malicious exercise of the husband's power as a basis for inferring that the śāstric writers treated these restrictions as being merely recommendatory; but in doing this he is merely superimposing the view of a modern sociologist upon that of the śāstric writers. We have already seen that the latter considered woman's position to be comparable to that of a minor⁽²⁾ and therefore there is little possibility that they treated this restriction on alienation by women as merely recommendatory.

In conclusion it may well be asserted that the restriction on alienation may be totally inconsistent with prevailing sentiments and requirements of the Hindu community at present. But the task of bridging the gap between the existing law and public opinion might more properly be left in the hands of the legislature than in those of the High Courts, whose judges are frequently and not unnaturally prone to rely upon recent editions of the established text-books. A text-book writer is at liberty to express what the law should be but it is normally understood to be his duty clearly to maintain the distinction between the law as it is and the law as it ought to be so that the Court will normally be quick to

(1) For the opinion of these three authors see *supra* pp.219-21.

(2) *Supra* p.37.

detect the boundary between expressions which belong to the respective categories.

So it must be reaffirmed here that wealth earned by a woman, whether it is, for other purposes, treated as strīdhana or not, is, according to the Śāstra, not freely alienable by her during coverture. As regards gifts from strangers, however, although the same rule might have been expected to have been applied judicial decisions have treated them as strīdhana on the basis that they form the absolute property of a woman.⁽¹⁾ Such property being absolute property of a woman it is freely alienable by her at any time. The point is thus covered by a judicial authority which happens to be repugnant to the śāstric authority on this point.

Passing to the other species of non-technical strīdhana it may be stated as a general rule that where a particular kind of property such as an acquisition by inheritance, by adverse possession etc. has been recognised to be strīdhana it has been recognised as such usually on the ground that such property becomes the absolute property of a woman. There have been very few cases in which a question as to the woman's power of disposition over her non-technical strīdhana was directly called in question. All of them come from the Bombay school and relate to the property inherited by a female which, in a particular class of cases, is regarded as strīdhana according to the Bombay school.

Before we consider the relevant authorities on this point

(1) Supra pp. 169-72, 189.

it is necessary to recapitulate that according to the Mithila school and the Mayukha moveable property which a woman inherited from her husband was always considered to be at her absolute disposal, and hence strīdhana till the full bench of the Bombay High Court overruled its previous decision and held, in Gadadhar v. Chandrabhagabi,⁽¹⁾ that a widow's power of alienating moveables inherited from the husband does not include the power of disposing of them by will. The mischief was further aggravated in a later decision of the same High Court wherein it was held that by analogy with the decision in Gadadhar's case the widow cannot have the right to dispose of such moveables even by gift inter vivos.⁽²⁾ A Jain widow, however, gets an absolute interest in both moveable and immoveable property inherited by her from her husband provided it is non-ancestral.⁽³⁾ This rule is based upon custom and is thus exceptional.

In Bombay property inherited by a female from a person born in her own family or from any other female is considered to be her strīdhana. In the beginning at least such property was, on the basis of the Śāstra and custom, considered to be woman's absolute property and descendible to her own heirs "whether or not it be strictly entitled to the name of stridhan or peculium."⁽⁴⁾ Being an absolute property of a woman such property ought always to have been declared to be at the absolute and unfettered disposal of the

(1) (1892) 17 Bom. 690 F.B.

(2) Pandharinath v. Govind (1908) 32 Bom.59. For the whole case-law on this point see supra pp.156-59.

(3) Supra pp.148.

(4) Navalram v. Nandikishore (1861) 1 B.H.C.R. 209, see supra p.150.

woman.⁽¹⁾ But, as we shall presently see, the judicial law took a different turn in this matter.

In Bhau v. Raghunath⁽²⁾ a question arose as to whether property inherited by a daughter from her mother can be validly bequeathed by her without the husband's consent to her will. Jenkins C.J. referred to the remarks of West J. in Vijiarangam's case,⁽³⁾ namely, that according to Vijñāneśvara a right of free disposition was not one of the essentials of ownership and that a woman was always subject to the control of her husband etc. with regards to the disposition of her immoveable property. He referred to the Mayūkha stating that the woman has no independent power over ādhivedanika etc.⁽⁴⁾ and held that the property is not saudāyika and hence a woman is not entitled to dispose of the same by a testament if the husband does not signify his consent thereto. He admitted, however, that such property is her absolute property according to Vinayek's case and Pranjivandas's case.⁽⁵⁾ From a śāstric point of view the decision is correct. For Nīlankaṇṭha expressly said that woman has no freedom in 'ādhivedanika etc.'. Firstly, Nīlankaṇṭha does not include in strīdhana property inherited by a woman⁽⁶⁾; so he could not have thought of keeping such property at the disposal of a woman. Secondly, even if it is presumed - erroneously, of course,

(1) The words 'absolute owner' necessarily imply the right to sell or lease the owned property - see Stroud's Judicial Dictionary vol.L.p.13; see also Gupte's Hindu Law p.565.

(2) (1905) 30 Bom.229.

(3) Vijiarangam v. Lakshaman (1871)8 B.H.C.R.244 at 264. See supra.

(4) For the text see supra p.209.

(5) See supra pp.150-51.

(6) Supra pp.28-26.

as all scholars and judges have done⁽¹⁾ - that Nīlakaṇṭha includes in strīdhana all the categories of the so-called non-technical strīdhana it must be taken for granted that he includes, as Jolly points out,⁽²⁾ all those categories in the words 'et cetera' when he says that 'Ādhivedanika etc.' should not be considered to be at the absolute disposal of a woman. From the point of view of the precedents, however, the decision does not appear to have been entirely sound since in the previous decisions such property was declared to be the absolute property of a woman irrespective of the question whether it is strīdhana or not.

In Bhagvanlal v. Bai Diwali⁽³⁾ the same question arose, but the wife, in this case, had been deserted by the husband for about 30 to 40 years. Macleod C.J. observed that the texts referred to in Bhau's case "contemplate quite a different state of facts from those which have been proved to exist in this case."⁽⁴⁾ and held that the woman in this case was entitled to bequeath her inherited property without the consent of her husband. Apparently the learned Chief Justice accepted the ratio decidendi adopted by the lower appellate court, namely, that where the obligation of the husband to maintain his wife ceases to be discharged his right to control his wife also determines. The reasoning is very appropriate, as well as rational, since the Śāstra makes it a bounden duty

(1) Supra p.89.

(2) Jolly's T.L.L.(1883)p.253. Jolly relies upon this word 'Ādi' here to show that the enlargement of the concept of strīdhana in the Mayūkhya is the same as that in the Mitākṣarā.

(3) A.I.R. (1925) Bom.445.

(4) Ibid at p.446.

of the husband to maintain even his profligate wife.⁽¹⁾ So notwithstanding the fact that Nīlakaṇṭha gives the husband a right to control even his superseded wife it is equitable to suppose that he loses his rights where he does not discharge his duties.

The same question occurred before Sir John Beaumont C.J. sitting as single judge in Sarubai v. Narayandas.⁽²⁾ The wife in this case had lived separate from the husband for about 27-28 years but was staying in a temple belonging to the husband. Quoting Mulla's Hindu Law,⁽³⁾ wherein it is stated that a woman under coverture cannot alienate her non-saudāyika property, Sir John observed " ... coverture under English law is synonymous with marriage and a woman under coverture is simply a married woman ... But in English law a woman does not cease to be under coverture because she ceases to live with her husband."⁽⁴⁾ Distinguishing Bhagwanlal's case he remarked that desertion in that case was treated almost as 'a de facto divorce' and added that divorce is not allowed by Hindu law and that therefore the doctrine is somewhat dangerous.⁽⁵⁾ Admitting that the decision in Bhagwanlal's case bound him, he refused to give a liberal interpretation to the same and observed that though the emancipation of women in India has proceeded some way "it is still a long way short of the point reached by women in England at the time when the Married Women's Property Act was

(1) See infra p.537.

(2) I.L.R. (1943) Bom. 314.

(3) Mulla's Hindu Law 9th edi. p.143.

(4) Report at p.317.

(5) Ibid at p.318.

passed sixty years ago."⁽¹⁾ He maintained that the bulk of the female population of India was, at the time of the decision, still illiterate and that the limitations on their power of disposal were for their own benefit and protection.

Although the decision, being in accordance with its precedent, is justifiable and correct the reasoning is questionable. In the first place, coverture even under the English law does primarily mean the state of a woman wherein she is presumed to be under the protection of the husband. But this presumption is a rebuttable one and it is only with the intention of giving the gist that coverture is usually explained as the condition of a woman during marriage.⁽²⁾ Therefore a woman under coverture denotes, as rightly pointed out by the subordinate judge in this case, only a woman who is under the power and protection of the husband. Secondly, it is incorrect to say that Hindu law does not recognise

(1) Ibid at. p.319.

(2) Byrne's Dictionary of English Law p.262 : "A married woman, during the continuance of the marriage, is called in Norman French a feme covert, because she is under the protection of her husband. Coverture means - (1) the condition of a married woman, or the fact of her being married, and (2) the continuance of the marriage. If she becomes, and while she remains, a widow, she is said to be discovert." See also Wharton's Law Lexicon pp.278-79 wherein coverture is described as "the condition of a woman during marriage, because she was then presumed to be under the influence of her husband, so as to excuse from punishment for crimes committed in his presence, except treason, murder and manslaughter (see Reg. v Manning

Addition to p.284 note 2 : The above comments against the decision in Sarubai's have now been at least partially justified by the recent decision of the divisional bench of the Bombay High Court in Shantabai v. Ramachandra (1959) 61 Bom.L.R.627.

the offence was committed in the presence of, and under the coercion of the husband." See also Prostitution and the law p.81 note no-19; A century of family law pp.165-69; Earl Jowitt : A dictionary of English law (1959) Vol. I p.533.

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divorce at all. Kauṭilya in his [^] does recognise divorce and makes provisions for it.⁽¹⁾ It is also quite common amongst the śūdras and the aborigines of India and is known as 'pat' and 'natra' in the Maharashtra and Gujrat respectively.⁽²⁾ The decision in this particular case, however, was correct as the woman was actually living under the protection of the husband.

The Nagpur High Court held in Vithu v. Maruthi⁽³⁾ - a case under the law of the Bombay school - that the property inherited by a daughter from her father is her non-saudāyika strīdhana and that therefore she cannot alienate the same without her husband's consent. But the same High Court considering the same problem in Dhondappa v. Kasabai⁽⁴⁾ came to the opposite conclusion, namely, that such property is saudāyika strīdhana of a woman and that she can freely alienate it by gift inter vivos or by will. The learned judges considered all the cases mentioned above but depended more upon the opinion of Mayne and Mr. Gupte to the contrary.⁽⁵⁾ They also considered all the texts of Kātyāyana⁽⁶⁾ on this point and drew support from the case of Venkatarreddi v. Hanmantgouda⁽⁷⁾ wherein it was decided that property bequeathed to a woman is her saudāyika strīdhana and that it is at her free disposal. However, they hesitatingly stated their conclusion as follows : "It is

(1) See supra pp.41-42.

(2) See infra p.624.

(3) A.I.R.(1928) Nag.92.

(4) A.I.R.(1949) Nag.206.

(5) Ibid at pp.209-10. Mayne 10th edi.p.749 and Gupte 2nd edi. p.572 were referred to.

(6) For Kātyāyana's verses see supra. In this case verses nos. 899-901 and 904-907 from Kane's edition were referred to.

(7) (1932) 57 Bom.85. See supra p.269.

saudāyika strīdhana within the meaning of the verse 901 of Kātyāyana Smṛiti. ... The property in suit was saudāyika property. Even if it was not saudāyika, it was at any rate strīdhana over which Radhabai had absolute power of disposal without the consent of her husband." As the decision in this case relies upon the same mistaken reasoning as the later full bench decision of the Bombay High Court does the inaccuracies of both will be analysed in considering the latter.

In Gajanan v. Pandurang,⁽¹⁾ the above-mentioned Full Bench of the Bombay High Court considered the question "Whether property inherited by a woman from her parent is saudāyika or non-saudāyika strīdhana?" Gajendragadkar J. who delivered the judgment answered the question in the affirmative and gave the following rationes for his decision.

(1) Considering the Mayūkha on this point he referred to the different texts of Kātyāyana and Manu and also referred to the remark of Nīlakaṇṭha, namely, 'It would, however, be proper to interpret the text as showing an absence of absolute dominion in strīdhana such as Ādhivedanika and the like.'⁽²⁾ However, the learned judge did not make any comment on Nīlakaṇṭha's remark and came to a strange conclusion : "Thus it will be seen that Nīlakaṇṭha does not express any definite opinion of his own but refers to the relevant texts from different smṛitis."⁽³⁾

(1) A.I.R.(1950) Bom.178. It is surprising that the decision in Dhondappa's case has not at all been referred to in Gajanan's case.

(2) See supra p.209 for the text.

(3) A.I.R. (1950) Bom.178 at. 181.

(2) The word 'labdham' or its variant reading 'prāptam' (i.e. 'obtained' or 'received' respectively) include property obtained by gift, bequest or succession. The word appears in the definition of saudāyika given by Kātyāyana another version of which reads 'dattam' instead of 'labdam'. But 'dattam', though it really includes only gift inter vivos, was interpreted in Fakirgouda's ⁽¹⁾ case to include even property obtained through a legacy which was declared to be saudāyika in that case. On principle, therefore, property obtained by succession should also be treated as saudāyika; for the failure of a person to make a will "would obviously be consistent with his desire that the said female relation should obtain his property."⁽²⁾ In any case 'labdham' includes gift, bequest and inheritance.

(3) The Vivādachintāmaṇi reads : "Thus the result is whatever is obtained by a maiden or a married woman from her parents or from the relations of her parents' family or from the family of her husband, all that is her saudāyika strīdhana." Quoting this the learned judge remarked : "It is thus quite clear that Vivāda Chintāmaṇi construes the word Saudāyika literally"⁽³⁾ and includes therein property acquired by gift, bequest and succession.

(4) As regards the texts imposing limitations it was remarked "The restrictions contained in these texts are no more than moral precepts or 'laudatory statements' (Arthavāda) and

(1) (1933) 57 Bom. 488.

(2) Report at pp. 182-83.

(3) Report at p. 183.

they must now be treated as obsolete. We have no doubt that these texts do not at all agree with the sense of the community today."⁽¹⁾

(5) As regards property obtained by a daughter etc. in Bombay the title of the female heir is 'otherwise absolute'. She is the sole owner and none else has a vested interest in the same, "and looked at from this point of view the limitations imposed upon her ... seem ... to be quite inconsistent with her undoubted title over it."

Upon the basis of this reasoning the Full Bench of the Bombay High Court overruled its previous decisions in Bhau's and Sarubai's cases. Considering the original precedents of the Bombay High Court which declared property inherited by a daughter etc. to be their absolute property there can be no doubt that the decision of the Full Bench is quite consistent with the original position of the Bombay law which the Full Bench merely revived from a different point of view. But instead of adopting this perfectly justifiable ratio decidendi alone Gajendragadkar J. unfortunately chose to rely on the Śāstra. But in his zeal to derive support from the Śāstra he has made several statements which derive no support whatever from any of the Sanskrit commentaries and contradict many. It is necessary, therefore, to make the following comments upon his reasoning.

(1) In the first place, Gajendragadkar J. does not try

(1) Ibid. Incidentally it may be noted that an arthavāda does not necessarily mean a laudatory statement. It may contain either 'praśamsā' (praise) or 'nindā' (censure). See supra.

to throw any light on Nīlakaṇṭha's remark about 'Ādhivedanika etc.' and still ventures to state that Nīlakaṇṭha does not express any opinion of his own. Nīlakaṇṭha does not include in strīdhana property inherited by a woman and even assuming that he does it is certain that he does not include it in saudāyika.⁽¹⁾

(2) Secondly, the distinction between 'labdham' and 'dattam' appears to have been artificially introduced by him to create an impression that the Court had already disregarded the restricted sense of the word dattam, which does not include a bequest. Really speaking the reading 'dattam' has been accepted only in the Śukranītisāra⁽²⁾ - a treatise which comparatively wields very little authority in the sphere of vyavahāra. Moreover though the analogy between a gift and bequest has always been admitted in Hindu law⁽³⁾ the analogy between a bequest and inheritance has never been established. Indeed the whole distinction which positive law makes between testamentary and intestate succession depends upon the distinction between volitional and unvolitional devolution of the property of the propositus. Hence the equation laid down by the learned judge may fail to convince.

(3) Thirdly, when he is quoting the Vivādachintāmaṇi as an authority for his decision he is surely doing injustice to its author. The sentence which he quotes is torn from its context. In fact, after having explained the eight categories of the so-called technical strīdhana mentioned in the smṛitis, Vāchaspati says

(1) See supra p.209.

(2) See the Dharmakośa p.1453^(a) See also the appendix text no.50.

(3) See supra pp.166 (note 1), 269.

"These are the categories of strīdhana. This alone is the saudāyika of women."⁽¹⁾ After this he refers to the definition of saudāyika

given by Kātyāyana and makes the remark cited by the learned judge.

(4) Fourthly, in the (supposed) absence of any guidance from the Mayūkha on this point the learned judge ought, it is submitted, to have relied upon the view of Vijñāneśvara pointed by West J. and referred to in Bhau's case as well as in this case.⁽²⁾ He could have referred also to the opinion of Bālabhaṭṭa, which is contrary to the decision given in this case.⁽³⁾

(5) Fifthly, the learned judge does not give his reasons why he regards the restriction upon alienation by women as merely a moral precept and why it should be treated as obsolete. If maintaining one's own wife is considered a mandatory provision of the law the provision setting up the husband's control, a corollary to the above provision, must also be considered as a mandatory provision. Moreover whether the mere sense of the community may cause a rule of positive law to become obsolete is a highly controversial question. Judicial pronouncements in either direction are available. According to the better view an attempt on the part of the Court to declare a positive rule obsolete is a usurpation of the function of the legislature.

Nevertheless the decision in this case was itself in consonance with the early Bombay decisions declaring inherited

(1) "Evaṃ strīdhanāni bhavanti, etadeva strīnam saudāyikam, tathā cha Kātyāyanah 'Udhayā kanyayā vāpi Bhraturityupalakṣaṇam, tena kanyayā vā ūdhayā vā pitṛito vā tatkulato vā patikulato vā yallabdham tatsarvaṃ tasyāḥ saudāyikamityarthah." - Vi.Chi.139.

(2) See supra pp.281.

(3) Supra p.211.

property, in a particular class of cases, to be the absolute property of women. As the obiter dicta and some of the rationes of Gajendragadkar J. tend to make it appear that the Śāstra is in accord with the modern conditions it is not surprising that the medieval commentators themselves interpreted the smṛitis to suit the conditions prevailing in their own days.

The above decisions refer only to the rights of a woman during coverture. But as the husband alone has been mentioned as having control over the alienations made by a woman it follows as a logical result that a widow can freely dispose of all her strīdhana whether acquired during coverture or subsequently. The question about the two categories of property, namely, property earned by women and gifts given to them by strangers comes into prominence here. Trevelyan suggests that a woman can dispose of her self-acquisitions 'whensoever acquired.'⁽¹⁾ But Grady seems to treat self-acquisitions acquired during coverture as being husband's property.⁽²⁾ It has been shown that notwithstanding the śāstric position that such property is not strīdhana according to the Bengal school, the Mithila school, the Southern school and the Mayūkhā⁽³⁾ it has uniformly been declared by all the Courts to be strīdhana.⁽⁴⁾ Supplementing these decisions with that part of the śāstric law

(1) Trevelyan's Hindu Law p.429. For support Trevelyan relies upon Banerjee. But Banerjee refers to property acquired during widowhood alone as being freely alienable by a woman - Banerjee pp.380 and 383. He does not say anything about the property acquired by a woman during coverture.

(2) Supra p. 274.

(3) Supra.

(4) Supra pp. 169-72, 189.

which remains unabrogated we find as a necessary consequence that even these two kinds of property may freely be alienated by a widow. Mr. Gharpure, however, makes a novel suggestion. He says that if the wife predeceases the husband the property should go to the husband and his heirs but if the husband predeceases the wife she should become the absolute owner.⁽¹⁾ The suggestion obviously confuses the idea of ownership in, and the right of disposition over such property, and the first part of the suggestion is contrary to the decisions which declare such property to be strīdhana.

The woman's right to dispose of her strīdhana is evidenced, by implication, in other provisions of the Śāstra. Thus Yājñavalkya and Kātyāyana declare that a woman is bound to pay her own debts and debts contracted by her in conjunction with her husband.⁽²⁾ The second part of the above provision has been introduced as an exception to the general rule that the husband, wife, a son etc. are not to be held responsible for the repayment of debts contracted by each other.⁽³⁾ But Kātyāyana somewhat obscurely warns that a person should not lend money to women, infants and slaves as the creditor is not in a position to recover that money.⁽⁴⁾ Devaṇṇa explains that the reason is that women etc. are always in

(1) See Gharpure's Hindu Law pp.462-63. Supra p.274.

(2) Yaj.II.49 and Mit. on it; Kātyāyana cited in Smr.Cha.411 etc., Kane's edi. no.

(3) Yaj.II.46.

(4) "Na strībhyo bālādāsebhya prayachchhet kvachidudhritam/
Dātā na labhate tatttu tebhyo dattam tu yadvasu // - Kātyāyana quoted in the Smr.Cha.321 and other treatises. This edition of Smr.Cha. reads 'dadyāt' for 'dattam' given above. But see the Dharmakośa p.631.

a dependent position.⁽¹⁾ In any case this text does not declare women etc. to be incapable of contracting a debt. It merely warns the creditors of the risk they might undergo if they lend any sum to women etc. For instance, knowing that a particular woman owns large property as her strīdhana but not knowing that it is only her non-saudāyika a creditor may advance a large sum to that woman and may, in the absence of the consent of the woman's husband, fail to recover it from her. Similarly in the case of a debtor who is a minor the creditor would not be in a position to recover his money without the consent of the guardian of the minor.

Viśvarūpa, the earliest commentator on the Yājñavalkya smṛiti, raises the question how women can independently contract a debt and repay it. In answer to it he points out that Nārada describes moveable property given by the husband to be at the free disposal of women. He also states that women can contract debts for the purpose of their own maintenance etc.⁽²⁾ Thus a woman evidently has both a capacity to contract a debt and an independent responsibility to repay it.

The position stated above relates to the civil law. Even according to the criminal law a woman's strīdhana was to be utilised

(1) Smr.Cha.311. The authors of Vi.Ra.(p.6) and Vi.Se.(f.14b) appear to acquiesce in the admonition given by Kātyāyana in this verse.

(2) Kutah punaḥ strīṇāṃ svātantryenarṇaprasaṅgaḥ, kuto vā dānamiti. Strīṇāmapī hi svātantryena dhanam vakṣyati bhartrā prītena yaddattam' ityatra. Svaśarīropabhogārtham strīṇāmṛṇaprasaṅgo apyaviruddhaḥ." - Vis.on Yaj. II.49.

for the purpose of discharging financial obligations which she may incur in a Court of law. Thus Kātyāyana states that where a woman is to be punished, her strīdhana should be utilised by the king for the recovery of the fine to be imposed; if she is penniless a corporal punishment is to be inflicted.⁽¹⁾ Thus it is clear that a woman cannot absolve herself of her financial responsibilities by claiming that no one except herself has a right to take her strīdhana. From the rules about debts and punishment it is also evident that the Śāstra does not, in this respect, intend to distinguish between a woman under coverture and a woman not under coverture. But the right of the creditors etc. to lay their hands upon the strīdhana of the female debtor must be considered as proceeding upon a presumption that a woman is at liberty to deal with her property as she likes, and so a creditor can proceed against only saudāyika of a woman under coverture. The illustration given by Viśvarūpa enables us to infer that a woman's contractual liabilities are limited only to the property which is at her free disposal.⁽²⁾ As regards the non-saudāyika of a woman under coverture her ownership can determine only by her death or by an alienation made by her with the consent of her husband. It is his right to see that the wife's non-saudāyika property goes, in the absence of any necessity to the contrary, intact into the hands of her heirs. The husband may agree to his wife's non-saudāyika being attached and sold in execution of

(1) "Strīdhanam dāpayeddandaṁ dhārmikāḥ prithivīpatiḥ/
Nirdhanā prāptadoṣā strī tādānam dandaṁmarhati // - Kātyāyana
cited in Vi.Ra.659; Vi.Se.112a etc.

(2) See supra p.293 wherein Viśvarūpa quotes Nārada's verse declaring women's independent right to dispose of the moveable property given by the husband.

a money-decree against his wife. But the creditor cannot compel him to signify his assent; for when a creditor has independent transactions with a woman he does not thereby put her husband under any kind of contractual obligation. However, a creditor can proceed against both *saudāyika* and non-*saudāyika* of a maiden or a widow because a maiden or a widow has an unfettered right to dispose of all her *strīdhana*.

But in Nanubhai v. Javher⁽¹⁾ a woman who had, without any justifying circumstances,⁽²⁾ voluntarily separated from her husband pleaded that she was not responsible for a debt which she contracted during coverture without the husband's consent. The High Court referred to some of the texts of *Kātyāyana*⁽³⁾ about *saudāyika* etc. and following two unreported cases⁽⁴⁾ held that a woman, in such a case, is liable for her debts though her liability is limited only to her *strīdhana*.

Haridas J. observed "A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract. In

(1) (1876) 1 Bom.121.

(2) For circumstances when a woman can justifiably leave her husband see *Manu* IX.79; *Na.Smr.*XV.97 and *Na.Sam.*13.99; *Kātyāyana* cited in *Vi.Ra.*447 etc., the *Dharmakośa* p.1112,

(3) '*saudāyike sadā strīṇām ...etc.*' and '*Na bhartā naiva cha sutah ...etc.*' referred to supra pp.71, 125.

(4) S.A. no.261 of 1861 decided by Sir M.Sausse C.Jr., Hebbert and Forber J.J. on 2-3-1863; S.A.no.467 of 1869 decided by Sir C. Seargent and Melvill JJ. on 17-1-1870. The point decided in both these cases appears to have been that a Hindu married woman's *strīdhana* could be proceeded against for the recovery of debt due under a bond executed by her without her husband's consent.

the enumerations of persons incompetent to contract given by Manu, Yajnyalkya, Kātyāyana and Gotama a woman as such is not included; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. She is capable of acquiring and holding property in her own right; and when she holds any such, her power over it is absolute."⁽¹⁾

Stating that a husband is liable for the debts of his wife contracted by her with his consent or contracted even without his consent in 'certain circumstances' 'empowering her to pledge her husband's credit', his Lordship remarked, "If, however, she enters into a contract in the absence of such consent or circumstances, she fails to bind her husband by her act. But the law does not say that she herself shall not be bound by it. On the contrary, we find it expressly laid down, that she shall pay amongst others debts contracted by herself."⁽²⁾ The learned judge abruptly concluded, however, that the woman's "liability is limited to the extent of any stridhan which she may have."⁽³⁾

The decisions involves two inaccuracies. Firstly it is wrong to hold that the creditor has a right to proceed against all the strīdhana of his female debtor. But the learned judge seems to have committed this mistake on the basis of another mistake of supposing that a woman has absolute power over all the property

(1) 1 Bom.121 supra at 123. The last underlined sentence contains an incorrect enunciation. The learned judge has, of course, forgotten that a woman under coverture owns her non-saudāyika in her own right but that her power over it is not absolute.

(2) Ibid pp.123-24.

(3) Report at p.125.

which she acquires in her own right. Secondly, the learned judge was not justified in refusing to proceed against the person of the female debtor in this case. According to the Śāstra the analogy between a man and woman is complete and a woman is not exempt from being arrested in execution of a decree against her. From Kātyāyana's statements it appears that a king can proceed against the person of a woman for the purpose of inflicting punishment upon her.⁽¹⁾ There is no reason, therefore, why the Royal edict cannot pursue the person of a female debtor as a result of a civil action.⁽²⁾

Depending upon the presumed analogy of English law it was held in Govindji v. Lakmidas⁽³⁾ that a wife who contracts a debt jointly with her husband is liable for repayment to the extent of her strīdhana. Sargent C.J. observed, "English authorities are of much assistance as laying down the general principle which governs the analogous case of married women in England in respect of their separate estate. Mr. Spence, in discussing the liability of a wife said that 'by reason that her dealings cannot be considered as entered into in respect of any personal responsibility, the course of modern authority has been in favour of holding that all her dealings

(1) Supra p.294.

(2) Under s.132 of the present Civil Procedure Code women not appearing in public are exempt from personal appearance in Court; but this does not "exempt such women from arrest in execution of civil process in any case ..." Under s.56, however, a woman cannot be arrested in execution of a money decree. Under the previous codes there was no such prohibition. Under Order XXI rule 32(1) of the present Code as it stood originally a woman could be arrested in execution of a decree for the restitution of conjugal rights. But the Code of Civil Procedure (Second Amendment) Act (XXIX of 1923) repealed this provision.

(3) (1880) 4 Bom.318.

must be considered as entered into in reference to her separate property."⁽¹⁾ The learned Chief Justice further observed : "In India, the strīdhana of a married woman is, as regards her power over it, analogous to the separate property of a married woman in England, and there is no reason why it should not be similarly dealt with so as to give effects to her contracts."⁽²⁾ Although the decision in this case is solely based upon a very debatable analogy between the English law and Hindu law⁽³⁾ and although it is given without referring to any of the śāstric texts on this point it is correct **only** to the extent of the non-saudāyika of a woman under coverture. It is, of course, entirely correct as regards the strīdhana of a woman who is not under coverture.

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It must, however, be remembered that according to Mitāk-
sarā a woman in such a case is liable only on the failure of the
husband and in the absence of a son.⁽⁴⁾ This is quite understand-
able. The joint debt of husband and wife must be considered
primarily to be that of the husband; for the wife has little reason
to incur debt for herself so long as her husband is able to main-
tain her. Moreover from the way strīdhana is declared to be immune
from claims by way of adverse possession or escheat⁽⁵⁾ it is clear

(1) 4 Bom.318 supra at 320.

(2) Ibid.

(3) Probably this supposed analogy between the English law and Hindu law induced their Lordships in this case and in Nanubhai's case to give their decisions without distinguishing between a woman's saudāyika and non-saudāyika. The same analogy appears to have misled the Courts in believing that only the property and not the person of a married woman could be proceeded against in a suit for recovery of debt.

(4) Mit.on Yaj.II.49 : "Yachcha patyā saha bhāryayā riṇaṃ kṛitaṃ tadapi bhartrābhāve bhāryayā aputrayā deyaṃ."

(5) Supra pp55-56.

that Hindu law wants to give it a special protection and to retain it as far as possible in the hands of the original owner. Even the husband himself can lay his hands upon the strīdhana of his wife only as a last resort.⁽¹⁾ Therefore where husband and wife are joint debtors their creditor must proceed first against the property of the husband and then, if his claim still remains unsatisfied, he may proceed against the strīdhana of the wife. This preferential order between the husband's property and the wife's strīdhana for the purpose of discharge of joint debts of both is a point which was not noticed at all in Govindji's case. In *Narotam v. Nanka*⁽²⁾ the learned subordinate judge discussed this point very ably with the help of the texts but on appeal the High Court simply followed the previous decisions without feeling obliged to discuss the merits of the reasoning of the subordinate judge.

In *Nahalchand v. Bai Shiva*⁽³⁾ the Bombay High Court confirmed the decision of the subordinate judge of Borsad which was to the effect that both the person and the property of a remarried widow can be proceeded against in a decree for a debt contracted by her during her widowhood. The learned subordinate judge referred to many texts and cases on this point and set out the following reasons for his decision.⁽⁴⁾

(1) Supra p. 230.

(2) (1882) 6 Bom. 473. This case and Nahalchand's case (see below) are glaring instances which show that sometimes an intricate point of Hindu law is discussed much more radically and thoroughly in the mofussil Court than in the High Court which either meekly accepts the reasoning of the Lower Court or blindly rejects it.

(3) (1882) 6 Bom. 470.

(4) As the Bombay High Court simply confirmed in one sentence the

(1) That the Śāstra does not make any difference between male and female for the purpose of repayment of debt.⁽¹⁾

(2) That the decision in Nathubai's case was based upon two unreported cases the authority and the reasons of which the subordinate judge was unable to discern.⁽²⁾

(3) That the Courts in Borsad district usually gave decree both against the person and the property of Hindu widows.⁽³⁾

(4) That though ~~from~~ the analogy of English law the liability of a married woman may be limited to her own strīdhana only, the case of a widow remarrying after contracting a debt was different as 'the creditor had no means of knowing that she would marry again.'⁽⁴⁾

Once the analogy between English law and Hindu law is accepted there can hardly be any difference between a married woman and a remarried widow and the latter would be under coverture equally with the former.⁽⁵⁾ If equality between men and women as regards repayment of debts is accepted as a principle in the judicial law

(decision of the subordinate judge in this case the reasoning of the latter is important for our purpose. Haridas J. who gave the judgement in Nanubhai's case was also a judge in this case and Narotam's case.

(1) But see Narotam v. Nanka (1883) 6 Bom. 473 wherein the subordinate judge who submitted the case for the opinion of the High Court himself observed on the authority of Kātyāyana (supra p. 292) that women are incompetent to contract and hence they have no liability at all to repay their debts.

(2) But Nathubhai's case was a conclusive authority for the subordinate judge - a point which he seems to have quietly slipped over.

(3) The subordinate judge quoted the following Sudder Court cases in support of his rule - Ootamram v. Mt. Bhanee Borr. II. 185; Ootamram v. Hargovindas Borr. II. 127.

(4) 6 Bom. 470 supra at 472.

(5) See Byrne p. 262 quoted supra p. 284. , "If she becomes, and while she remains, a widow, she is said to be discovert."

as it has been in the Śāstric law then all women would be liable to the extent of their property and person; therefore widows, whether remarried or not, cannot, for this purpose, be segregated from other women. But we have already seen that the Śāstric equality has been flouted by the case-law so far as women under coverture are concerned.⁽¹⁾ There is no reason, therefore, why it should be resorted to only for the purpose of proceeding against the widows.

The question of the repayment of the debts of a remarried widow has been dealt with, though ambiguously and inadequately, in the Śāstric law. Bhavasvāmi commenting on Nārada says that a widow who remarries against the wishes of her son loses all her strīdhana and that her previous debts are to be paid by the second husband.⁽²⁾ Mitra Miśra suggests that the debt of such indigent remarried women is to be paid by the son by her previous marriage.⁽³⁾ The commentators differ in interpreting this verse.⁽⁴⁾ For instance, Chanḍeśvara

(1) See Nathubhai's case and Govindji's case supra.

(2) Na.Smr.IV.20 and Na.Sam.II.17 (the Dharmakośa p.699). Bhavasvāmi says that the son takes even her technical strīdhana and that she ceases to be a debtor. "Putravatī yā nārī putramutsrījyānichchayā putrasyānyaṃ patimāśrayet, tasyāḥ svam dhanam haret sarvaṃ. Sarvagrahaṇam sadvidhasyāpyupasaṅgrahaṇārthaṃ. Evaśabdānnarṇīti gamyate. Tatascha sā nissvaiva bhavati tasyai dattaṃ hīyate, tasmānna dātavyamiti vidhiḥ." On the other hand, Asahāya commenting on the same verse says that her second husband takes her strīdhana whereas the property of her first husband is taken by her son by her first marriage. It seems that 'taking', in the case of the second husband, has been used in the sense of 'acquiring dominion over.'

(3) Vi.Mi.275.

(4) Devaṇṇa and Kamalākara do not interpret this verse as pertaining to the case of a remarried widow - see Smr.Cha.407 and Vi.Ta.506.

takes this verse as referring to the repayment of the debts of the previous husband.⁽¹⁾ So the Śāstra has left this point obscure. In the absence of any definite precept of the Śāstra it must be assumed that a remarried woman possessing strīdhana is as much answerable to the claims of her creditors as any other woman under coverture is.

However, the provision of Bhavasvāmī coupled with a provision of Kauṭilya to the same effect, namely, that the widow who remarries without her son's consent loses all her strīdhana; is an interesting one.⁽²⁾ No scholar appears to have taken a special notice of this strange provision of divesting. Apparently it would appear that by remarriage the widow goes under the control of the second husband. It was probably because of this that she was divested of all her strīdhana in favour of her children by the first marriage. But the provision may reasonably apply only to the strīdhana which was given to the woman by her first husband or his family. As regards her other strīdhana it is more reasonable to hold that she was not divested of the same but that she continued to own it subject to the control of her second husband whose rights would have been exactly similar to those of the first husband.

So much for the woman's right to dispose of her strīdhana,

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- (1) Vi.Ra.65. This appears to be a better interpretation as a similar verse of Nārada which is immediately next to this verse refers specifically to payment of the debts of the previous husband - see Na.Smr.IV.21 and Na.Sam.II.18.
- (2) Kau.III.2. : "Putravatī vindamānā strīdhanam jīyeta. Tattu strīdhanam putrā hareyuh. Putrabharanārtham vā vindamānā putrārtham sphātīkuryāt. See Shamashāstri's edi.pp.152-53; Ganapati Śāstri's edi.Vol.II.p.15.

her right to contract debts, and her independent liability which proceeds as corollary to the latter. Turning now to the husband's right to take and utilise his wife's strīdhana it was decided as early as 1808 A.D. in Hammuckah v. Rungapah⁽¹⁾ that this right of the husband is entirely personal and that the creditor of the husband cannot compel him to utilise his wife's strīdhana even in case of adverse circumstances like restraint etc. It was held that the wife's strīdhana cannot be seized under a writ of execution passed against the husband's property. The case was followed by the Bombay High Court in Tukaram v. Gunaji.⁽²⁾ In Radha v. Bishe-shur⁽³⁾ their Lordships of the Allahabad High Court appear to have taken for granted that this is the ^{correct} position. The point has not arisen in the form of an issue since 1874 and is thus firmly established.

We may proceed to consider the husband's right to take (graha) his wife's strīdhana. It was held in Nammalwar v. Perunde⁽⁴⁾ that the word 'taking' as used by Yājñavalkya and interpreted in the Smṛitichandrikā means 'taking and using',⁽⁵⁾ and if the husband dies after taking the strīdhana but without using it, the wife remains the owner of the property and can recover the same from anyone into whose possession it has fallen. So far as the principle of the decision is concerned there can be no disagreement; for even

(1) Strange's Hindu Law vol.II.p.23. See also the remarks of Strange in vol.I.p.27.

(2) (1871)8 B.H.C.R.129.

(3) (1874)6 N.W.P.H.C.R.279.

(4) (1927)50 Mad.941.

(5) Yaj.II.148 supra.

when the husband uses his wife's strīdhana he is supposed, as Mitra Miśra points out, ⁽¹⁾ to repay it to his wife as soon as he becomes able to do so. In any case the wife's ownership does not become extinct. But the facts of the case unfortunately do not appear to come within the rule and the decision is therefore probably unfounded. The husband of the plaintiff in this case was ordered by a Court in previous litigation to pay Rs. 1200 to the defendant, who was plaintiff in the previous case. The husband agreed to sell the jewels of his wife - the plaintiff in the present case - and handed them over to a 'mediator'. He had also applied for the sanction of the Court as the defendant was to receive them on behalf of a minor. Before the sanction of the Court was obtained the husband died but the defendant maintained that the husband had taken his wife's strīdhana in distress and so she had no right to recover it. The Court in this case, as we have seen, found for the plaintiff wife. The husband had taken the strīdhana in 'sampratirodhaka' which, according to Devaṇṇa, means any kind of attachment (āsedha) by the creditor which cannot be avoided except by repayment of debt. ⁽²⁾ Āsedha denotes any kind of restrictions imposed in the name of, or injunction issued by, the king. ⁽³⁾ It is evident that the husband avoided the attachment upon his property which would ^{otherwise} have been the consequence of the Court's decision. This was done with the help of the agreement to sell the jewels - an agreement a breach of which

(1) Supra p. 230.

(2) "Sampratirodhake dhanādānam vinā nivārayitumaśakye dhanikāse-dhādaḥ." - Smr. Cha. 658.

(3) "Āsedho rajajñayāvarodhaḥ." - Mit. on Yaj. II. 5. See the different kinds of āsedha mentioned therein. See also Dr. Rocher's Vya. Ch. pp. 48 and 183-84.

would have made him personally liable for damages as well. In such circumstances it is hard to believe that the husband did not use the ornaments but simply took them.

From the foregoing discussion it seems that the case-law on the subject of disposition of strīdhana has been much more uniform than that relating to acquisition of strīdhana. Although the former is based on a mistaken appraisal of the Śāstric law on this subject it incidentally produced one salutary effect, namely, the law of all the schools has tended to be substantially similar. Having surveyed the law about the acquisition and disposition of strīdhana we now turn to the devolution of strīdhana which a woman leaves undisposed of at the time of her death.

The development of the meaning of the word strīdhana and of the rights of a woman over her strīdhana had also its counterpart in the rules of succession to the same. The diversity is also similar. The order of succession "varies according as the intestate was married or unmarried and according as she was married in an approved form or in an unapproved form; it also varies according to the source from which the strīdhana came and above all the rules of descent vary from school to school."⁽¹⁾ The diversity and the intricacies as they are seen today are, however, due to the later growth of the law as stated in the commentaries and digests. Originally the law relating to succession to strīdhana was as simple as the law relating to the meaning of the word strīdhana itself. It is interesting to see how the original succinct statements of law⁽²⁾ have been widened into the enormous size of the law on the subject as it exists today.

It is notable that the earliest sūtra referring expressly to the word strīdhana contains not a definition of the word but the order of succession applicable to strīdhana. Gautama declares : "Strīdhana devolves upon unmarried and unstabilised daughters."⁽³⁾

(1) 'The Law Relating to Hindu Succession' p.3 - a pamphlet published by the Ministry of Law, Government of India. See also Mayne pp.740-41.

(2) The term has been used here to denote the provisions as contained in the sūtras alone. The brevity of these provisions is partly due to the very nature of the sūtra literature and partly due to the inchoate development of the law as it existed at that time. For salient features of the sūtra literature see *Supra* p.38.

(3) Gau.Su.28.25, appendix text no.1.

It must be stated here that by following the translation given by Colebrooke all the authors and judges have translated the word 'apratīṣṭhitā' as 'unprovided^{for}' instead of 'unestablished' (i.e. not set up in life).⁽¹⁾ Colebrooke appears to have relied upon Viññā-eśvara who, at one place, explains the word as meaning poor or indigent (nirdhanā).⁽²⁾ The word originally denotes only lack of stability in life and hence absence of respectability as well.⁽³⁾

The point would be amply clear if we consider the explanation given by some of the early commentators. Aparārka gives the most correct though inconveniently wide explanation of the word saying that 'pratiṣṭhitā' denotes one who is childless, indigent or unfortunate.⁽⁴⁾ The last alternative gives the best explanation of the word 'apratīṣṭhitā' though it must be admitted that neither this explanatory word nor the word explained is precise in its meaning. A daughter who has no stability in life on account of some circumstances may also be called an unfortunate daughter.

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- (1) See Colebrooke's translation of the Mitaksara I.i.11 and I.ix.13. only
- (2) Mit.on II.117 contains 'indigent' as the explanation of the word 'apratīṣṭhitā' whereas Mit.on Yaj.II.145 contains 'indigent or childless' as the explanation of the same word in the sūtra.
- (3) In this sense it is used also in some of the modern Indian languages like Marathi, Gujrati etc.
- (4) "Anapatyā, nirdhanā, durbhagā vā." - Apa.on Yaj.II.117. The word 'durbhagā' may also denote a widow. In Maharashtra even today a married woman is, in contradistinction with a widow, called 'saubhāgyavatī'. Medhātithi on Manu IX.131 explains 'apratīṣṭhitā' as childless or having no 'pratiṣṭhā' (stability or respectability). The alternatives childless, indigent, unfortunate, widowed have been also given in the Vya.Ka.; VilRa.; Di.Ka.; Vi.Cha.; Vi.Mi. (tikā) on Yaj.II.117; Vi.Mi.; Vi.Sa.etc. See infra.

Similarly the other explanation viz. 'childless' given by Medhātithi, Aparārka, Vijñāneśvara, Maskari and other authors is not without its significance.⁽¹⁾ For a childless woman always stood in the danger of being superseded by another wife. All the authorities giving rules of supersession almost uniformly give the husband a right to remarry in case the wife does not bear any children or gives birth only to female progeny.⁽²⁾ So a barren woman could never possess stability in life and hence was always unfortunate and 'unestablished'. Even in the present century a childless woman always stood in the danger of being superseded. So this explanation is of vital importance in determining the meaning of the term 'apratisthitā'.

It is not surprising that an unmarried daughter has also been included in this preferential list of heirs to mother's property. An unmarried daughter was, and has always been throughout these years, a heavy responsibility for the family. On the deceased mother's property, therefore, there could not be a better claim than that of her unmarried daughter who could be dowered and disposed of in marriage with the help of her inherited property.

Taking into consideration the purpose which strīdhana was meant to serve, namely, of being useful in case of calamity⁽³⁾ or

(1) Apa.on Yaj.II.117; Mit.on Yaj.II.145; Mas.on Gau.28.25. See also above. The Gautamasūtra 28.25 is in Haradatta's Mitākṣarā no.28.22.

(2) Bau.II.2.65; Kau.III.2; Manu IX.18 etc.

(3) Kauṭilya III.2 supra 'āpadartham hi strīdhanam', appendix text no.19

for maintenance, ⁽¹⁾ it is not surprising that Gautama laid down an order of succession to the same with a view to make it devolve on the females who were most in need of it. For if an unmarried daughter inherited some money therē was a greater possibility of her getting married; in the case of a married childless daughter the inheritance constituted a reserve fund to fall back upon in case of supersession. The Sūtra therefore shows two salient features of the earliest provisions of the law on succession to strīdhana. Firstly, the absolute property of females was to devolve upon female heirs in preference to male heirs; ⁽²⁾ secondly, the policy of the law was more to subsidise the unfortunate heirs than to benefit all the heirs who would otherwise claim by propinquity or religious efficacy.

It is quite possible that Gautama intended that both unmarried and unfortunate daughters should succeed simultaneously to the strīdhana of their mother. The first explanation given by Maskarī does not contain the order of succession between these two classes and supports, by implication, the above conjecture. ⁽³⁾ Haradatta, however, specifically states the order of succession as unmarried daughter, 'unstabilised' daughter, and 'stabilised' daughter. ⁽⁴⁾ Maskari gives also an alternative explanation of the

(1) 'Tairdattam taprajīvanam.' - Kātyāyana quoted supra.

(2) See also infra pp.314,317,323,332,364.

(3) " ... duhitṛīnāmadattānāmanapatyānām cha bhavati."

(4) Haradatta's Mit.on Gau.28.22. Haradatta interprets this sūtra, however, as referring only to property obtained by a woman from her father's family. He appears to interpret a sūtra of Saṅkha and Likhita to mean that unmarried daughters, married daughters and sons share equally the property which their mother obtained from her husband's family. For this sūtra see infra pp.318-19.

same sūtra whereby he gives another interpretation of 'apratīṣṭh-itānām' as denoting unmarried or indigent sons.⁽¹⁾ According to this second interpretation which he states as being the opinion of 'some others' he chalks out the following order : unmarried daughter, indigent sons, unmarried sons, childless daughters, and the husband. The very artificiality of the interpretation of the word 'apratīṣṭhitānām' as referring to sons denotes an ingenious attempt to superimpose upon this sūtra the theory of simultaneous succession of sons and daughters, which was definitely of a later origin. It is to be noted with satisfaction, however, that none of these later authors who propound the simultaneous succession of sons and daughters with respect to certain categories of strīdhana pretends to find a support or authority for his provisions in the above-mentioned sūtra of Gautama.⁽²⁾ The law expounded by these authors will be stated below.

Gautama lays down another order for the class of strīdhana known as śulka. He says : "The śulka of a sister goes to her uterine brothers and to the mother in default of them", and adds "others say that (the mother should be) the first (heir)."⁽³⁾

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- (1) Such an interpretation is grammatically possible as the genitive plural of both the masculine and the feminine adjectives viz. apratīṣṭhita and apratīṣṭhitā is the same. But this interpretation requires the supposition of an additional word 'putrānām' as the noun which the above adjective is supposed to qualify.
- (2) For instance Jīmūta and Devaṇṇa prescribe joint succession for sons and daughters in anvādheya but they take this Gautama-sūtra as referring only to yautaka in which they give a preferential right to the daughters. See infra.
- (3) Gau.Su.28.26 and 28.27.

The natural construction of these two sūtras would show that according to Gautama Śulka goes by succession to uterine brothers first and then to the mother. He also appears to give the opposite order of succession in the next sūtra as being the opinion of some other authors. It is surprising, however, to find that both the commentators of Gautama viz. Maskari and Haradatta, interpret the sūtras inversely and give the order according to the first sūtra as first the mother and then uterine brothers. Though such an interpretation is not grammatically impossible it is improbable in view of the construction of the sūtra as a sentence.⁽¹⁾ Maskari in fact maintains that even the mother succeeds only in default of the father himself.⁽²⁾ Both these commentators point out that Śulka means the bride-price which is given in the unapproved forms of marriage as a consideration for giving the daughter in marriage. It is not surprising therefore that the heirs to such property are to be from the proposita's parental family and not from her husband's family. This also explains why Maskari considers the father as being the first preferential heir. In fact at least in the earlier days the property could hardly be called daughter's strīdhana; for it was handed over to the

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- (1) For if this was the meaning intended to be conveyed by Gautama he might more appropriately have said 'māturūrdhavam' instead of 'ūrdhvam mātuh'. Moreover he would have put both these words in the beginning of the sūtra. The comma which appears after the word 'mātuh' in the Mysore edition of the Maskari-bhāṣya is unwarranted and tends to distort the explanation given by the author. See the bhāṣya on Gau.28.26.
- (2) "Evañcha piturabhāve mātāiva tasyeṣṭa ityuktaṃ bhavati." - Mas.on Gau.28.26.

father of the bride himself.⁽¹⁾ The order of succession represents, however, a period of transition when the father started giving back the bride-price to the bride herself so as to constitute her own *strīdhana*. The law perhaps in recognition of this sacrifice of the father, created an order of succession in his favour. The preference in favour of the uterine brothers also indicates that from ancient times the law of succession to *strīdhana* preferred persons related through the mother to persons not related to the mother. Consequentially the relation through males which is so important in determining a preferential right of an heir to a male's property appears to have been insignificant in determining succession to a female's property. Indeed some of the later authors prefer relations through females to relation through males in some cases.⁽²⁾

Baudhāyana gives the following provisions for succession to the ornaments of a woman : "The daughter shall get the ornaments which their mother received through tradition or otherwise."⁽³⁾ The word '*sāmpradāyika*' (handed over in succession or a continuous

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- (1) Haradatta actually states that it is received by the father.
 (2) For instance Vijñāneśvara prefers the daughter's daughter to the son and son's son. See below pp. 339-40
 (3) Bau.Su.II.2.49, appendix text no.5. Pratāpa Rudra, however, quotes another *sūtra* of Baudhāyana : "Strīdhana goes to the mother and in default of the mother to the uterine brothers." - Sa.Vi.384. But he interprets the *sūtra* to refer only to *śulka* - apparently an arbitrary interpretation but for the fact that the order mentioned in this *sūtra* is similar to the order of succession to *śulka* as given by Gautama and by Baudhāyana in another *sūtra*. The *sūtra* is not found in the extant work of Baudhāyana nor is it quoted in any of the reputed commentaries.

tradition) suggests that every family had some set of ornaments which traditionally passed on from the mother to the daughter and then to the daughter's daughter and so on from generation to generation. Incidentally this provision also goes to disprove the theory of the Bengal school, namely, strīdhana once devolved ceases to be strīdhana.⁽¹⁾ The word 'anyat' seems to refer to any other ornaments which a woman may acquire as a gift from her husband, father-in-law etc. The sūtra was probably written at a time when the strīdhana of a woman could hardly consist of anything else except her ornaments.⁽²⁾ Hence in this sūtra they stand virtually as representative of all her strīdhana.

In a separate sūtra Baudhāyana also gives the order of succession applicable to strīdhana of a maiden.⁽³⁾ It is as follows the uterine brothers, mother, and father. The words being very clear it is not possible to force two different interpretations upon this sūtra as has been done in the case of Gautamasūtra applicable to śulka. It might be urged that this sūtra tends to disprove the interpretation put upon the Gautamasūtra by Maskari and Haradatta. As an exception to the general rule that females are preferred to males in succession to strīdhana we find that amongst the collaterals males are preferred to females: not only that the brothers are

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- (1) This theory of the Bengal school was made applicable to all the schools by Macnaughten and others and the judicial law blindly accepted this analogy. See supra.
- (2) Apa.Su.II.14.9 gives ornaments to be the property of the wife. See supra p.53.
- (3) Baud.Su.as referred to in Mit.on Yaj.II.146; Apa.on Yaj.II.145 and many other treatises, see appendix text no. 6, However the text is not found in the extant dharmasūtras of Baudhāyana.

preferred to sisters but the latter are not at all mentioned as heirs.

Vasiṣṭha declares : "That which was acquired by the mother at her nuptial ceremony should be partitioned by women."⁽¹⁾ The word 'women' in relation to the word 'mother' naturally denotes her daughters. This sūtra confirms the proposition that at least originally female heirs were preferred to male heirs in succession to strīdhana. The famous doctrine of spiritual benefit has thus no application whatsoever to strīdhana though, as we shall see later on, it managed to creep in afterwards in some of the commentaries and digests. The other inference to be drawn from this sūtra is that nuptial presents like śulka formed in very early days an important category of strīdhana. A cursory glance at the sūtras just preceding this sūtra, wherein the different shares for the eldest, the middle and the youngest sons in the paternal property are given, proves that succession to strīdhana was also a supplementary process to the partition of paternal property.⁽²⁾ Especially in a case where the paternal property was divided by the sons after the death of their mother this partition of father's property and succession to mother's strīdhana must have been effected as supplementary proceedings.

Another important variant reading of the same sūtra gives 'pariṇāhya' or 'pāriṇāhya' instead of 'pāriṇeya' or 'pariṇāyya'.

(1) Vas.Smr.17.43, appendix text no.8.

(2) See also infra pp.318,329 Ghose says that it was in connection with partition that the law of strīdhana developed - see T.L.L.(1904)pp.311-13. See also Vishnu v. Krishnan (1909)25 T.L.R. 196 at 217.

The former denotes the household utensils of the kitchen or the exclusively personal property of a woman like her set of cosmetics etc. The latter denotes nuptial presents. The first reading has been accepted by Aparārka, Lakṣmīdhara, Bālabhaṭṭa etc.⁽¹⁾ On the other hand Jīmūta, Haradatta, Mitra Miśra and others accept 'pariṇāyā' or its nearer form having the same meaning.⁽²⁾ The former form viz. 'pāriṇāhya' is found in the old vedic literature as well, wherein the wife is declared to be the mistress of the pāriṇāhya.⁽³⁾ Looking after the pāriṇāhya was, according to Manu, a task reserved for women.⁽⁴⁾ Therefore it appears that this reading is older and probably original. It is more likely, however, that by the time Vasiṣṭha wrote his smṛiti the concept of strīdhana had grown much wider and that strīdhana of a woman included not only her household property but also property which was given to her by way of marriage-settlement. The importance of the latter reading would become apparent when we come to examine the different lines laid down by the different commentators who accept this reading. As Vasiṣṭha does not give a line of succession for any other kind of woman's property it may be concluded that this pāriṇeya or pariṇāhya constituted almost the whole of women's exclusive property in the days of Vasiṣṭha.

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- (1) Apa on Yaj.II.117; Vya.Ka.689; Bal.on Yaj.II.145. The variations amongst these readings are very slight and unimportant.
- (2) See infra.
- (3) "Patnī hi pāriṇāhyasyeśe." - Tai.Saṃhitā VI.2.2.1. See also Ka.Sam.24.8; Mai.Sam.III.7.9 which give a similar reading. See supra p.49.
- (4) Manu IX.11.

Viṣṇu adds a few more details to the above provisions - a fact which apparently suggests that his smṛiti was written later than the above sūtras. This inference is also fortified by the fact that Viṣṇu gives many additional categories of strīdhana not mentioned by any of his predecessors and mentions almost all the categories mentioned by those who wrote after him.⁽¹⁾ About succession to strīdhana he declares : "In a case where a childless deceased woman was married in one of the four forms of marriage, viz. the Brāhma etc., the strīdhana devolves upon the husband. The father succeeds to the same in case she was married in any one of the other forms."⁽²⁾ He adds : "If she has given birth to children whatever property she had devolves upon the daughter in all forms of marriage."⁽³⁾ The word 'Brāhma etc.' denotes the four approved forms of marriage viz. the Brāhma, Daiva, Ārṣa and the Prājāpatya. The rest of the forms are the Gāndharva, Āsura, the Rākṣasa and the Paiśācha.⁽⁴⁾ It can easily be seen why a distinction between approved and unapproved forms of marriage was set out for the purpose of prescribing two different lines of succession. In the approved form the father himself used to offer his daughter to a suitable husband worthy of her. In the unapproved forms except the Āsura the girl was married to her husband without the consent of her parents etc. Even in the Āsura,

(1) Supra pp. 63-64.

(2) Vi.Smr.17. 19-20, appendix text no.10.

(3) Vi.Smr.17.21, appendix text no.11.

(4) For the eight forms of marriage see Gau.IV.6-15; Bau.I.11.20; Manu III.27-34; Yaj.I.58-61; Vis.24.17-37 etc. For approved and unapproved forms of marriage see Apa.II.5.12.3; Bau. I.11.20.10-11; Manu III.24,39,41,42 etc. See Mayne pp.120-136, Banerjee pp.86-95.

the marriage being more of the form of a sale there was always a danger of the girl being offered to an unsuitable person. Such being the case the Śāstra treated a girl married in an approved form as having become the sapinda of the husband whereas it treated a girl married in an unapproved form as having remained a sapinda of the father alone. So while an approved marriage brought about a complete fusion of the girl with the new family, an unapproved marriage was not strong enough to sever her religious and legal bonds with her father's family. Hence the difference between the two lines of succession. This fundamental cause of difference is helpful in understanding the detailed lines of succession which arose later on. By making all the property of a woman to devolve upon her daughters Viṣṇu confirms our former conjecture that originally in succession to strīdhana females were preferred to males.⁽¹⁾

Pratāpa Rudra in his usual habit of concoction gives two more sūtras of Viṣṇu which cannot be traced in the extant work of the latter or in any one of the reputed commentaries or digests. They are as follows : "The śulka of a sister goes to the mother and (in her default) to her uterine brothers."⁽²⁾ "The yautaka of the mother is inherited by the unmarried daughters alone."⁽³⁾ It will be seen later on how these fabrications lend an apparent support to the different lines of succession propounded in the Sarasvativilāsa.

(1) See supra p. 309, 314

(2) "Bhaginīśulkaṃ mātuh sodarāṇāmeva." - Viṣṇu quoted in Sa.Vi.384.

(3) "Yautakaṃ mātuh kumārīdāya eva." - Viṣṇu quoted in Sa.Vi.382.

A few sūtras attributed to Saṅkha or to Saṅkha and Likhita give supplementary provisions concerning succession to strīdhana. Saṅkha declares : "When an inheritance etc. is being partitioned the daughter should get the ornaments and the nuptial strīdhana."⁽¹⁾ The word 'et cetera' in 'inheritance etc.' (dāyādye) seem to have been intentionally used since in the opinion of some authors women were incapable of having any inheritance (dāya).⁽²⁾ This sūtra lends support to our theory that distribution of the paternal and maternal property ran on parallel and supplemental lines. The nuptial strīdhana referred to in his sūtra appears to denote the strīdhana to be handed over to, or on behalf of, the daughter at the time of her nuptials. This will support our conjecture that an unmarried daughter was preferred in succession to her mother's property because she was to be dowered with the help of such property.⁽³⁾ But it is quite likely that this nuptial strīdhana denoted the nuptial property of the mother which was also to be the nuptial property of the daughter; in this sense it was, in Baudhāyana's words, the 'sāmpradāyika' property of the descendants in the direct female line.

Another sūtra attributed to Saṅkha reads : "All the uterine brothers deserve to get the inheritance from their mother

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- (1) Saṅkha quoted in Vi.Mi.456 etc., appendix text no.15.
The reading accepted in the Dharmakośa pp.1428-29 gives the word 'kanyā' twice which makes the meaning slightly confused.
- (2) Supra pp. 50-51.
- (3) Supra p.308.

equally, and so also all the unmarried daughters."⁽¹⁾ As the whole of the smṛiti of Saṅkha is not available it is very difficult to say whether the adverb 'equally' applies cumulatively or severally to the two classes of heirs.

Another sūtra reads as follows : "The husband of a childless deceased daughter who had been treated as a son (putrikā) does not deserve to take (her) property."⁽²⁾ This is quite natural since the daughter who has been made a putrikā retains her proximity with her father's family;⁽³⁾ hence the line of succession excludes the husband in the first instance and prefers her parental family. This rule obviously applies to a putrikā married in approved or unapproved form for the reason behind^{it} would be equally applicable to both these cases.

Another sūtra lays down that the bridegroom should take his own śulka.⁽⁴⁾ From the use of the word 'bridegroom' it is clear that this provision refers not to succession to śulka but to retraction of śulka by the bridegroom in case the bride dies before the marriage takes place. The provision evidently applies to śulka in the sense of bride-price, and it is similar to the one laid down

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- (1) Saṅkha quoted in Bal.on Yaj.II.145 etc., appendix text no.16. But the word 'mātrikaṃ' has been dropped in Da.Bha.IV.2.4 and Vi.Ta.452 which implies that it does not necessarily apply to the property of the mother only.
- (2) Saṅkha quoted by Apa.on Yaj.II.145 etc., appendix text no.18. See also "Tadapatyasya cha dhanam kanyābhāga eva." - quoted in Vya.Ka.726 which is somehow connected by Lakṣmīdhara to succession to the property of an after-born brother of a putrikā.
- (3) See Va.Smr.17.15; Saṅkha quoted in Vya.Ka.724.
- (4) Saṅkha quoted in Sa.Vi.385 etc., appendix text no.17.

by Yājñavalkya.⁽¹⁾

In striking contrast with the above authors Kauṭilya appears to be much in favour of the sons in succession to strīdhana. After having stated that a woman should only enjoy her strīdhana during her life-time and that she should give to her sons all the property which is at her absolute disposal he proceeds to provide that the strīdhana of a mother should be partitioned, after her death, by both her sons and daughters, in default of the sons by the daughters alone, and that in default of both it should be taken by the husband.⁽²⁾ Here the simultaneous right of sons and daughters is stated very unambiguously. This is not surprising in view of the fact that Kauṭilya has special predilection for male issue in general.⁽³⁾ After giving the above provisions he adds : "Śulka, anvādheyaka as well as any other (strīdhana) given by the bandhus (lit. relatives) should be taken by the bandhus."⁽⁴⁾ The statement is ambiguous. The explanation given the modern Śrīmula is that in case of the woman married in one of the unapproved forms the strīdhana goes to the parents etc. Obviously the author of the Śrīmula⁽⁵⁾

(1) Yaj.II.146 infra.

(2) See the passage "Kāmakārāṇīyamapi tadabhāve bhartā." - Kau.III.2, Gaṇapati Śāstri's edi.vol.II p. 16 ; Shama Sastri's edi.p.153.

(3) For instance according to him only sons are entitled to take the strīdhana of a remarried woman - supra p. 302. Moreover observing that women are meant merely to produce male progeny he authorises men to have any number of wives for this purpose. "Putrārthā hi striyāḥ." - Kau.III.2, Shama Sastri's edi.p.

(4) "Śulkamanvādheyakamaṇyadvā bandhubhirdattam bāndhavā hareyuḥ." - Kau.III.2 Gaṇapati Śāstri's edi.vol.II p. 16 , Shama Sastri's edi.p.153.

(5) Śrīmula (lit. the root of wealth) is an elaborate commentary on Kauṭilya's Arthaśāstra. It is written in this century by Gaṇapati Śāstri who is the first person to carry on an extensive research on Kauṭilya.

was impressed by the provisions found in other treatises where such distinction between approved and unapproved forms of marriage has been made for the purpose of determining the lines of succession. If that was Kauṭilya's intention he would not have sorted out only a few categories of strīdhana for his provision nor would he have added the unnecessary words "as well as any other (strīdhana) given by the bandhus." In view of the fact that in an immediately preceding passage Kauṭilya deals with strīdhana given by the husband or the father-in-law (from another point of view viz. divestment) it is probable that this latter provision refers to the property given by the paternal family of the woman and to śulka which, by common consent, devolves upon the parents of the proposita. If this be the correct meaning of the above sentence it appears that according to Kauṭilya strīdhana of a childless woman devolves simultaneously upon two lines of heirs depending upon the source whence it came. The husband and his side took what they gave to the proposita whereas the father and his side took all they had given to her. That the inherent rights of both the families were retained in the strīdhana which they gave to the woman is more clearly shown by the fact that Kauṭilya authorises a woman only to enjoy her strīdhana during her life-time⁽¹⁾ and treats it as a kind of reserve fund to be used in case of calamity.⁽²⁾

There are a few sūtras ascribed to the Paithīnasi and they

(1) Supra p.320.

(2) Supra p.54.

appear practically to be variant readings of the three sūtras of Saṅkha quoted above, namely, those referring to succession to nuptial strīdhana and ornaments, to śulka, and to the strīdhana of a putrikā.⁽¹⁾ Hence they need not be discussed in detail.

Manu makes the following provisions for succession to strīdhana. He says : "However, whatever is the yautaka of the mother devolves by succession upon the unmarried daughter alone."⁽²⁾ The word 'however' has been introduced because in the previous verse succession to a male's property has been discussed and the daughter's right thereto has been enunciated.⁽³⁾ The interpretation of the word 'yautaka' is very important in understanding other verses of Manu. Medhātithi, Sarvajñanārāyaṇa, Kullūka and Rāmachandra take the word yautaka as simply equal to strīdhana or the mother's property. Medhātithi and Kullūka also refer to Gautama's sūtra mentioned above to equate the provisions in that verse with that contained in this verse.⁽⁴⁾ Rāghavānanda and Nandana, however, interpret 'yautaka' as meaning property which a woman gets from her father or his family. The etymological explanation of the word can suit neither of these meanings. But Medhātithi's comment makes it amply clear that at least in the earlier days yautaka which was the sum total of all strīdhana devolved upon an unmarried daughter in preference to all other heirs.

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- (1) See appendix text nos. 85 and 86, the Paithinasi quoted in Vi-se-f. 32(b).
 (2) Manu IX.131, appendix text no. 21.
 (3) Manu IX.130.
 (4) Supra p. 306.

Another verse of Manu has been a source of prolonged controversies amongst the authors of the different schools. It is as follows : "After the death of the mother let all the uterine brothers divide the maternal wealth equally; and so let the uterine sisters do."⁽¹⁾ In the next verse he adds : "If they have any daughters they should, in accordance with their need, be given something out of their grandmother's property with affection."⁽²⁾ The word 'they' (tāsām) refers only to sisters and not brothers. That the son's son or the son's daughter should not get any share simulteneously with the son or the daughter but that the daughter's daughter should get one is an indication of the fact that succession to strīdhana is more favourable to females and heirs related through the female descendants.⁽³⁾ As in the case of the Saṅkhasūtra⁽⁴⁾ the question is whether the word 'equally' applies simulteneously to both the classes of heirs so that both the sons and daughters should take equal shares simulteneously. But, against such a suggestion, there is another verse in the Manusmṛiti wherein a similar provision is stated in almost identical words. Manu there states that the wealth of a reunited brother should be shared equally by the uterine brothers, reunited step-brothers and by the uterine sisters.⁽⁵⁾ Leaving aside the interpretation of the commentators it cannot reasonably be supposed that Manu could have intended to give the sisters an equal

(1) Manu IX.192, appendix text no.23.

(2) Manu IX.193, appendix text no.24. For a similar provision of Brihaspati see infra.

(3) Supra p.309, 314, 317.

(4) Supra p.319.

(5) Manu IX.212.

192nd verse referred to above the above three commentators have definitely borrowed the qualification 'unmarried' from Manu's verse about 'yautaka'. Otherwise there can be no reason why the phrase 'uterine sisters' should be further qualified by the word 'unmarried'.

In the next two verses⁽¹⁾ Manu describes strīdhana and in the second line of the second verse states a general rule that such property devolves upon the progeny of the woman notwithstanding the existence of her husband.⁽²⁾ The general rule applies, of course, to strīdhana as described in both the verses. In the next two verses Manu gives the succession to strīdhana of a childless woman. He states that in case the woman was married in one the five forms of marriage viz. the Brāhma, Daiva, Ārṣa, Gāndharva and the Prājāpatya her strīdhana devolves upon her husband alone while if she was married in any one of the remaining forms her strīdhana devolves upon her father and mother.⁽³⁾ The provision differs from that of Kauṭilya and resembles the one given by Viṣṇu,⁽⁴⁾ the only alteration being that Manu includes Gāndharva also in the approved forms and gives the right of succession to both father and mother in unapproved forms of marriage. Manu does not give detailed line of succession in these two cases and none of his commentators is helpful in determining them. They have almost paraphrased Manu's provisions. But it is reasonable to suppose that according to Manu

(1) Manu IX.194-95, appendix texts nos. 25-26.
Supra p.61.

(2) Manu IX.195.

(3) Manu IX.196-97, appendix texts nos. 27-28.

(4) Supra p. 316.

and simulteneous right with their brothers in the reunited brother's property; because in succession to males property a sister is not considered to share equally with her brother. Moreover the above verse appears to apply to coparcenary property in which females had no share at all. So in all probability Manu intended to give the order of succession amongst these three classes, providing for an equal distribution per capita amongst each class in turn.⁽¹⁾ The same interpretation is presumably applicable to Manu's provision concerning strīdhana also.

The comment of Medhātithi on this verse appears to have been lost to us. Sarvajñanārāyaṇa, Kullūka and Rāghavānanda state that the unmarried sisters and uterine brothers share equally whereas on the authority of Bṛihaspati⁽²⁾ they recommend to give some gift to the married sister.⁽³⁾ But the former two commentators appear to take here a position contrary to the one which they have adopted in interpreting Manu's verse about yautaka as applicable to all strīdhana.⁽⁴⁾ They do not even try to reconcile their two positions. It is quite probable that Manu intended to give strīdhana equally to the unmarried daughters in the first instance, then to the married ones, and then to the brothers. In interpreting the

(1) Similar interpretation is given by Sarvajñanārāyaṇa.

(2) See *infra*.

(3) With the analogy of sister getting one-fourth share out of paternal property Kullūka suggests that the married sister also should get a comparable share in the mother's property.

(4) See their comments on Manu IX.131 *supra*.

strīdhana in the case of approved and unapproved forms respectively should devolve upon the next nearest sapinḍa of the woman in her husband's or the father's family respectively. The general rule of succession to male's property which he has stated just a few verses before the above verses, namely, the inheritance belongs to the next nearest sapinḍa,⁽¹⁾ should be held equally applicable to strīdhana as well by the principle of analogy (atideśa).

Manu also gives two other peculiar cases of succession. In one verse he says that whatever wealth has been given to a woman by her father devolves upon her brahmin daughter or her issue.⁽²⁾ All the commentators of Manu⁽³⁾ interpret this to mean that such property of a woman who is of a lower caste like Kṣatriya etc. should devolve upon her step-daughter who is a brahmin girl and not upon other step-daughters born from the mothers of the lower rank. This is obviously in the absence of her own issue.⁽⁴⁾ Thus it seems that although a brahmin can marry a wife from any of the four castes his issue from a brahmin wife has a special privilege and has greater rights according to the Śāstra.⁽⁵⁾ The rule should apply by analogy

(1) Manu IX.187 : "Anantarah sapinḍādyastasya tasya dhanam bhavet." The rule is to be followed in default of the heirs whom Manu has expressly mentioned.

(2) Manu IX.198, appendix text no.29. See also Saṅgrahakāra quoted in Ba.on Yaj.II.145.

(3) These, of course, do not include Medhātithi whose comment is lost to us.

(4) Rāmachandra is the only commentator who strangely appears to suggest alternative provisions (vikalpa), namely, that such property should go either to the issue of the woman or to the brahmin step-daughter.

(5) A person can marry a girl of his own caste or of any of the lower castes - Manu III.13. But preferably he should marry a girl of his own caste - Manu III.12. But in any case a brahmin should not marry a śūdra girl - Manu III.15-16; Yaj.I.56.

to the issue of the wives of other castes inter se as well according to the descending order of importance of the wives themselves.⁽¹⁾ But none of Manu's commentators appears to suggest anything to that effect. The provision proves that in the absence of an heir claiming proximity with the proposita by blood-relationship an attempt is to be made to find out an heir who is superior from the point of view of religious efficacy. It is inexplicable, however, why only property given by the father should alone have this peculiar kind of succession.

Manu who rarely gives details of provisions mentions another minute point in strīdhana succession. He says that in case two sons born of the same woman from two fathers fight for her strīdhana each of them shall get only his father's property which came to his mother's hand and not the property of the father of the other son.⁽²⁾ Kauṭilya gives a similar provision.⁽³⁾ This should naturally be held to apply to ^{the} property of the woman which was given to her by her husband only and not to all her strīdhana since in the case of other strīdhana both the sons have equal claim by proximity. This shows that remarriage was quite common or at least not unknown in the days of Kauṭilya and Manu. The provision is, however, contrary to the provision of Kauṭilya and Bhavasvāmi to the effect that a remarried woman loses all her rights to strīdhana given by her first

(1) See the order of preference mentioned in Manu III.12.

(2) Manu IX.191, appendix text no. 22.

(3) Kau. III.2, Shama Sastri's ed. p. 153, Gaṇapati Śāstri's vol. II p. 16.

husband; ⁽¹⁾ for the former provision contemplates a situation where-
in the strīdhana of the proposita is partitioned by her sons after ^{her} _^
death. This and the previous provision of Manu provide examples of
distinction between lines of succession as depending upon the source
of the strīdhana.

Proceeding to Yājñavalkya we find that, like Manu, he des-
cribes strīdhana in two verses ⁽²⁾ and in the second line of the
second verse gives a general line of succession : "In case the woman
dies childless the relatives (bāndhavas) should take it." ⁽³⁾ There
can be two interpretation of this verse and both are equally likely.
According to the first the word 'bāndhavas' denotes all relatives
and the word 'it' (tad) denotes all the strīdhana in the two verses.
The rule thus is merely a general statement that woman's strīdhana
goes to her relatives. On the other hand it could be argued [^] that
the word 'bāndhavas' denotes primarily brothers and in a secondary
sense all the heirs from the paternal family and that the word 'it'
denotes only property mentioned in the first line of the second
verse viz. śulka, anvādheyaka and bandhudatta. According to this
latter interpretation the rule makes the distinction of a line of
succession dependable upon the source or the kind of property. These
three are exactly the same categories of property as are mentioned
by Kauṭilya as devolving upon the bāndhavas who, as we have already
seen, mean in Kauṭilya's provision the relatives from the paternal

(1) Supra p. 302. According to Bharasvāmi this provision applies,
however, only to a widow remarrying against the wishes of
her son.

(2) Yaj. II.143-44 supra pp. 65.

(3) "Atītāyāmaprajasi bāndhavāstadavāpnuyuh." - Yaj. II.144.

side of the proposita.

Yājñavalkya gives a single verse for a general rule of succession to both male's and female's property. He says : "Let sons divide equally, after the death of their parents, both the property and debts; let the daughters share the residue of their mother's property after the payment of (her) debts; the issue succeeds in their default."⁽¹⁾ Here Yājñavalkya obviously reserves all the property of the mother in favour of the daughters alone in the first instance. Here an analogy between the son's right in his father's property and the daughter's right in her mother's property is clearly seen. The word 'anvaya' literally denotes one who follows or comes afterwards. Metaphorically it denotes 'issue'. Now this word would naturally include both the sons of a deceased woman and their progeny as well as the progeny of her daughters because all these constitute her 'anvaya'. But there is no clue as to whether there is to be an order of preference amongst the sons, the daughter's sons and the daughter's daughters. Very probably by virtue of proximity the son would have been preferred to ^{the} daughter's son as least.

As regards the property of childless woman, Yājñavalkya says that the property devolves upon the daughters in case the woman has given birth to children; if she has no children it goes to the husband in case she was married in one of the four approved forms and to the father in case she was married in any one of the others viz. the Gāndharva, Āsura, Rākṣasa and the Paisācha.⁽²⁾ The

(1) Vibhajeraṇ sutāḥ pitrorūrdhvamṛikthamṛiṇaṃ samam/
Māturduhitarah śeṣamṛiṇāttābhya ṛite'nvayaḥ // - Yaj.II.117.
(2) Yaj.II.145, appendix text no.35.

inclusion of the Gāndharva form in one of the unapproved forms denotes that probably the Gāndharva had lost its popularity amongst the higher castes by the time Yājñavalkya wrote his smṛiti. The word 'daughter' in this verse obviously denotes the daughter of the deceased woman and not her daughter's daughter as it is followed by the words 'in case (the woman) has given birth to children.'⁽¹⁾

Nārada gives a general rule of preference in favour of the daughter very much in the same way as Yājñavalkya when the latter states succession to both male's and female's property. Nārada says : "The property of the mother devolves upon the daughters; and in default of the daughter upon her issue."⁽²⁾ He also confirms Yājñavalkya's rule that in default of any issue strīdhana devolves upon the husband in the four approved forms of marriage and upon the father in case of the rest.⁽³⁾ Comments made on analogical provisions of Yājñavalkya are applicable mutatis mutandis to Nārada's provisions as well.

Bṛihaspati gives three verses on succession to strīdhana. He says : "Strīdhana devolves upon the issue, and the daughter, if she is unmarried, receives a share; but a married one receives something in token of honour."⁽⁴⁾ Here the word used for the issue is 'apatya' which ordinarily would include both male and female

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- (1) As Yājñavalkya specifically lays down succession to the property of a childless woman words about delivery or absence of any delivery naturally refer to the proposita herself.
 (2) Na.Smr.16.2 & Na.Sam.14.2, appendix text no.41. The verse is very similar to Yaj.II.117.
 (3) Na.Smr.16.9 & Na.Sam.14.9, appendix text no.42.
 (4) Bṛihaspati quoted in Vi.Mi.547 etc., appendix text no.43.

issue; but a specific mention of the daughter seems to suggest a preference in her favour. The distinction between the married and the unmarried ones inevitably establishes a close connection between this verse and the Gautamasūtra and fortifies the above conclusion. Probably Brihaspati wanted the sons denoted by the word 'apatya' to share with the married daughters.⁽¹⁾ Viewed in this light it seems that the first half of the first line in this verse states the general rule of succession; the second half states the preferential heirs and the second line gives a clue to determine the order of preference amongst these preferential heirs inter se.

Brihaspati also gives a line of heirs who are wrongly described as ultimate heirs by some scholars. He says : "The mother's sister, maternal uncle's wife, paternal uncle's wife, father's sister, mother-in-law, and the elder brother's wife are declared to be equal to (one's own) mother. When these women do not have either a son, a daughter's son or a son of either of these their property should be taken by the sister's son etc."⁽²⁾ The first 'suta' (son) has been taken in the above translation as being a noun qualified by the adjective 'aurasa' (legitimate) - this would be the natural construction of the sentence. The second 'suta' may reasonably be connected to both the son and the daughter's son. As not many verses of Brihaspati are available it is impossible to say whether he wanted these heirs to succeed before or after the husband

(1) See below Kātyāyana's provision to the same effect.

(2) Brihaspati quoted by Apa. on Yaj. II.145; Vya.Ka.693 etc., appendix text no.45.

etc. It is also not clear whether he wanted them to succeed in the order in which they are mentioned or according to their respective capacity of bestowing spiritual benefit upon the proposita, which appears to have been one of the prominent motives in mentioning them. But if ^{it is} supposed that, because of their analogy to the sons, these heirs are to succeed to the strīdhana of a woman immediately after her progeny and before her husband etc. then a number of complications would arise. For if she was married in an approved form there would be an undesirable contingency (anavasthāprasaṅga) of the husband's younger brother succeeding before the husband himself. Moreover this would also create an unsurmountable difficulty in fixing the positions of these heirs in case the woman was married in one of the unapproved forms in which case the succession devolves upon the father and his heirs. Therefore it is best to conclude that, at least in the system of the Mitākṣarā wherein there is a very little possibility of the exercise of the doctrine of spiritual benefit, this list of heirs denotes merely an enumeration of a few prominent relations who are entitled to succeed to a childless woman's strīdhana.

Kātyāyana recommends in one verse that strīdhana should go to sons in default of daughters; that whatever is given by the bandhus goes to the bandhus and in their default it goes to the husband.⁽¹⁾ The first provision confirms the general preference in favour of the female heirs and the second one is very similar to the

(1) Kātyāyana quoted by Apa.on Yaj.II.117 etc., appendix text no. 68.

provision given by Kauṭilya and to the second interpretation of Yājñavalkya's verse referred to above. One important addition is to be noted here, namely, that the lines of succession are not mutually exclusive and that when one line of heirs is exhausted the succession turns towards the other line as shown by the inclusion of the husband also. By analogy the principle may be applied to all other cases.

In another verse Kātyāyana states that the married sisters share equally with their brothers the strīdhana of their mother.⁽¹⁾ He also mentions that the wealth gained by a woman from her father in a marriage in one of the forms like the Āsura etc., goes to the parents in default of the progeny.⁽²⁾ With the help of the above-mentioned analogy it seems that it should also go to the husband in default of the parents and their heirs. The words used in this verse can be literally translated as 'whatever is gained by a woman in the Āsura form etc.' (āsuradiṣu ya^all_Abdham). This may denote the usual distinction between the lines of heirs as depending upon the form in which the woman was married so that the rule merely lays down the general rule of succession to all the property of a woman married in one of the unapproved forms. But these words are also capable of denoting particular kinds of property like śulka etc. which is obtained by a woman in Āsura marriage in contradistinction with the

(1) Kātyāyana quoted in Vi.Ta.452 etc., appendix text no.69.

(2) Kātyāyana quoted in Bal.on Yaj.II.145 p.257, appendix text no.70. From a combination of all the three verses just cited it would appear that the order of succession according to Kātyāyana was unmarried daughters in the first place, and married daughters and sons together in the second place.

approved forms of marriage. According to this interpretation the rule would be applicable only to property which is thus directly connected with her marriage. But the word 'paitrika' seems to be hanging aimlessly in either of these interpretations because in the case of the former all the property of a woman married in an unapproved form would devolve upon her parents whereas in the case of the latter interpretation, the wealth received by the bride in an Āsura form i.e. śulka etc. comes mainly from the bridegroom's party and not from her parents. The words used in this verse enable the commentators to enter into the controvertial question as to whether the line of succession depends upon the form of the marriage in which the proposita was married or upon the kind or the source of the wealth received in a particular type of marriage. A verse of Yama which is very similar to the above verse more distinctly supports the latter interpretation.⁽¹⁾

There is another text of Vṛiddha Kātyāyana which says that whatever immoveable property is given to a daughter by her father devolves upon her brothers in case she dies childless.⁽²⁾ This, of course, appears to be very reasonable. For even according to ^{the} custom amongst many communities immoveable property is given to a daughter with an implied condition that it is to revert to the father's family in case she dies childless.⁽³⁾

Devala gives a verse which emphatically states the equal

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- (1) Yama quoted in Bal.on Yaj.II.145 p.264, appendix text no.81.
 (2) Kātyāyana quoted in Vi.Ta.454 etc., appendix text no.71.
 (3) This was, for instance, a custom in Kathiawar. See Bhagwanji v. Wala Godad III K.L.R.(1892)p.105. See also Palaniappa v. Nachiappa (1941) II M.L.J. 558.

and the simultaneous right of sons and daughters. He declares : "On the death of a woman her strīdhana is shared in common by the sons and the unmarried daughters. If she died childless the husband, mother, brother or father succeed to the same."⁽¹⁾ The first provision is very clear and unambiguous so that unlike Bṛihaspati's provision no room is left for any doubt as to its meaning and effect. The second line is apparently not a statement of the order of heirs mentioned therein but merely an enunciation of many heirs.

We have now placed under review the sūtras and the smṛiti texts. Some of them strike us as ambiguous or unmeaningful. The public for whom they were written probably held the key to their meaning which was afterwards lost perhaps through break of the tradition (sampradāya). It is quite unlikely that all these provisions formed a homogeneous system. But we may proceed to observe how each commentator selects a few of them to be his literal guides while submitting others to far-fetched readings and interpretations in order to present the symmetry of his own concept of the subject. The skill of a commentator lies in securing the support of the maximum number of the important texts and in so neatly accommodating the debatable elements in the incongruent ones that the effect is to create an impression that all the texts are in harmony not merely with themselves but with just the system which that particular commentator is propounding.

Before entering into a detailed discussion of the law of

(1) Devala quoted in Vi.Mi.547 etc., appendix text no.80-

the different schools on succession to strīdhana it would be worthwhile especially to consider the opinion of the two early commentators of Yājñavalkya viz. Viśvarūpa and Aparārka. Both of them appear to be in favour of daughters as being the most preferential class of heirs and succession, according to both of them, devolves upon the sons only in default of the daughters.

Observing that there is a similarity between sons' succession to the father's property and daughters' ^{Succession} to their mother's property ⁽¹⁾ Viśvarūpa remarks that in default of daughters the sons who are comprehended by the word 'anvaya' succeed. He refers to one of the oldest verses of the R̥gveda ⁽²⁾ to assert the right of the sons and specifically repudiates the interpretation that in default of the daughters the succession devolves upon daughter's daughters. ⁽³⁾ On the authority of the Gautamasūtra, ⁽⁴⁾ however, he states the line of heirs as uterine brothers, and then the mother for all the property contained in the second line of the second verse of the enumeration of strīdhana given by Yājñavalkya viz. bandhudatta, anvādeyaka and śulka. ⁽⁵⁾ This brings him nearer to Kauṭilya's opinion

(1) "Yathā cha pituḥ putrāḥ samāṁsato dhanabnāginah tathaiva māturduhitarah." - Vis. on Yaj. II.121 i.e. Yaj. II.117 according to the Mit. or Apa.

(2) "Na jāmaye tānvo rikthamāraik chakāra garbham saniturnidhānam / Yadī mātaro janayanta vanhimanyah kartā sukṛitoranya rindhan/" - R̥gveda III.2.5.2. Viśvarūpa quotes the first two halves of the two lines. However, notwithstanding the authority of this Vedic verse in the son's favour he gives a preference to the daughter on the authority of the smṛiti provision of Yājñavalkya which is contrary to the Vedic provision. He has obviously broken the rule of giving preference to Śruti over smṛiti.

(3) Vis. on Yaj. 121.

(4) Supra p.310.

(5) Vis. on Yaj. II.148 i.e. II.144 in Mit.

making a distinction between lines of succession to depend upon the kind or the source of strīdhana. But he also confirms Yājñavalkya's distinction based upon the form of marriage.⁽¹⁾ His comments at both these places being very succinct it is not possible to see how he wants to reconcile these two provisions of his own.

Aparārka in general gives the order of succession as daughters and, in their default, sons. For this statement he refers to Kātyāyana as his authority.⁽²⁾ Like Medhātithi he takes yautaka to mean all the exclusive property of women⁽³⁾ and on the authority of Gautama lays down the order of succession as unmarried daughter, and then married 'unstabilised' daughters.⁽⁴⁾ Here he makes a singular, though from the point of view of the interpretation of the Gautamasūtra a correct, suggestion that notwithstanding the presence of married and stabilised daughters the sons succeed to their mother's strīdhana. Obviously there is no provision for such daughters in the Gautamasūtra; but Kātyāyana whose verse Aparārka has twice relied upon⁽⁵⁾ gives the right to the sons in default of 'daughters' and there is no reason why Aparārka should not include in these 'daughters' married stabilised daughters.

Aparārka confirms the distinction between the lines of succession depending upon the form of marriage in which the deceased

(1) Vis. on Yaj. II.149 i.e. II.145 in the Mit.

(2) Apa. on Yaj. II.117 and II.145. For Kātyāyana's text see supra. But see "Duhitrīṇaṃ tadanvayasya vābhāve putrā eva mātṛidhanam vibhajeran." - Apa. on Yaj. II.117.

(3) Apa. on Yaj. II.117 and Medhātithi on Manu IX.131.

(4) Ibid.

(5) Apa. on Yaj. II.117 and II.145.

woman was married.⁽¹⁾ Excepting śulka (in the sense of bride-price) Aparārka wants to avoid any kind of distinction in the line of succession based upon the kind or the source of the property of a married woman⁽²⁾ - a policy which, we shall see, is similar to that of Viṣṇuśvara. For śulka he gives the order given by Viśvarūpa which is followed by almost all other authors.⁽³⁾ As regards the strīdhana of a putrikā he gives the right to the husband in case she was made a putrikā with an understanding that her son should be the son of his grandparents; on the other hand, he gives the right to the mother etc. in case the putrikā was herself treated as a son.⁽⁴⁾ He mentions the verse of Brihaspati about the so-called ultimate heirs but does not make any useful comment on it.⁽⁵⁾ So he appears to have left the order of succession after the husband and the father respectively in approved and unapproved forms of marriage respectively to the reader's imagination.

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- (1) Apa. on Yaj.II.145. Taking into consideration the contradiction between Manu and Yājñavalkya on the number of the approved forms of marriage Aparārka suggests that in case the woman was married in the Gāndharva the property should by option (vikalpa) go to the husband.
- (2) See Apa. on Yaj.II.144 : " ... ityanena sarvaṃ strīdhanamupakalpitaṃ." Aparārka regards even the word 'paitṛika' in Manu IX.198 (supra) as representative of all the strīdhana of the step-mother.
- (3) Apa. on Yaj. II.145.
- (4) For the former alternative he gives the authority of Manu and for the latter of Saṅkha and Likhita. From the reasoning itself the reading of the Paithīnasi should be 'svasrā' instead of 'śvaśvā' thereby denoting the right of the sister rather than that of the mother-in-law. For the suggested reading and the same alternative explanation see Bal. on Yaj. II.145.
- (5) The same thing is done by Chanḍeśvara and Nīlakaṇṭha as well, see infra.

Vijñāneśvara who is peculiarly favourable to female heirs gives a popular reasoning for the cardinal principle followed in succession to strīdhana. He says : "Strīdhana devolves upon the daughters because the particles of a woman's body are abundant in her daughters; the father's property devolves upon the sons because the particles of the father's body are abundant in his sons."⁽¹⁾ Interpreting the word 'anvaya' used by Yājñavalkya⁽²⁾ as 'sons' he declares at one place that sons succeed in default of daughters⁽³⁾ who amongst themselves have an order of succession as unmarried, married but unstabilised, and married stabilised daughters. He includes in unstabilised daughters a daughter who is childless or indigent.⁽⁴⁾

By unduly distorting the verse of Yājñavalkya he gives a right of succession to the daughter's daughter in default of all the daughters.⁽⁵⁾ He gives them shares per stirpes as representing

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- (1) Mit. on Yaj. II. 117 : "Yuktaṃ chaitat. 'pumān pumso'dhike śukre strī bhavatyadhike striyā' iti stryavayavānām duhitreṣu bāhulyātstrīdhanam duhitṛigāmi. Pitṛidhanam putragāmi pitryavayavānām putreṣu bāhulyāditi."
- (2) Mit. on Yaj. II. 117.
- (3) Ibid.
- (4) Mit. on Yaj. II. 145. But see Mit. on Yaj. II. 117 referred to supra. Bal. on Yaj. II. 117 and Vi. Ta. 452 gives only 'indigent'. But the word should be held to include childless, unfortunate and widowed daughters as well. See supra.
- (5) Commenting on Yaj. II. 145 he says that as daughters are already referred to as 'duhitṛi' in II. 117 the same word in II. 145 denotes the daughter's daughter. This is done to avoid the fault of redundence (punarukti) according to Ma. Pa. 665-66; Vi. Mi. 549 and Ba. on Yaj. II. 145. The reason is obviously very artificial for Vijñāneśvara himself says that the adjective 'prasūtā' applies to the proposita herself. Moreover there is no reason why the sons who are stated to follow the 'duhitṛi' in II. 117 should also follow the 'duhitṛi' in II. 145 when Vijñāneśvara gives two different meanings to the same word occurring at two different places.

their mothers.⁽¹⁾ Here he distorts the text of Nārada also and says that in default of the daughter's daughters the daughter's sons succeed to their grandmother's property and that in default of the daughter's sons the sons of the proposita succeed.⁽²⁾ This is most unconvincing. For the word 'anvaya' in Yājñavalkya's and Nārada's verses probably had a similar meaning, as the purport of the provisions of the both appears to be similar.⁽³⁾ Moreover Vijñāneśvara does not avoid the imputation of inconsistency in as much as he admits at one place that sons succeed in default of the daughters and at another place depresses son's position even below that of a daughter's son.⁽⁴⁾ Again there is no reason why a daughter's son should, whether on the principle of propinquity or spiritual efficacy, be preferred to a son of the proposita herself. There is not a single smṛiti text which, expressly or by implication, prefers a daughter's son to a son. However, to resume the order laid down in

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- (1) Mit.on Yaj.II.145. The authority for this rule is Gau.Su. 28.17. The per stirpes succession has been accepted by all the commentators - see Smr.Cha.664; Vi.Mi.552; Vi.Ta.453 etc. The specific mention of this provision is necessary in view of the Jai.Su.X.3.53 'Samam syādaśrutatvāt' according to which all heirs succeeding simultaneously take equally. - See Vi.Mi.548. Jīmūta applies this maxim to Manu IX.192 thus giving equal shares to both sons and daughters together - see Da.Bha.4.2.8.
- (2) Kamalākara and others quote Manu IX.139 for the right of the daughter's son here - see Vi.Ta.454. But Manu IX.139 which refers to succession to male's property gives the right to the daughter's son after the son's son and because of the former's similarity to the latter. The rule cannot be applied when the order of succession is the reverse since the daughter's son and the son's son are 'upameya' and the 'upamāna' respectively. In a Sanskrit simile the latter is always stronger in excellence than the former. For 'upamāna' and 'upameya' see the Kāvya-prakāśa pp. 438 and the Sāhityadarpaṇa p.17.
- (3) Supra Yaj.II.117 and Na.Smr.16.2.
- (4) Compare Mit.on Yaj.II.117 and II.145.

the Mitākṣarā, the son's son succeeds in default of the son. Following Yājñavalkya Vijñāneśvara declares that in default of all these heirs up to the son's sons there is a bifurcation of the lines of heirs depending upon the form of marriage of the woman : if she was married in one of the four approved forms her estate goes to her husband and in his default to his nearest heirs;⁽¹⁾ in other cases it devolves upon the mother and then upon the father and in default of both upon their nearest sapinḍas.⁽²⁾ With this provision ends the line of succession given in the Mitākṣarā for a married woman's strīdhana.

Vijñāneśvara takes special pains to interpret Manu's verse about the sons and daughters equally dividing their mother's property.⁽³⁾ He observes that as both these classes are not referred to with an 'ekaśeṣa' compound⁽⁴⁾ the word 'equally' does not denote a cumulative equal division amongst the heirs of both these classes but a several division amongst these two classes though equal inter se, so that each member of each class takes equally only when that class succeeds. In the opinion of Vijñāneśvara words such as 'brothers should share equally and so should the daughters' convey a meaning similar to that conveyed by words such as 'John should

(1) Mit.on Yaj.II.145. But on Manu's authority Gāndharva also has been included into approved forms by Mitra Miśra, Kamalākara and others. See infra. But Vi.Mi.(tīkā) on the same verse prescribes equal division between the husband and the father in case the woman was married in the Gāndharva.

(2) Mit.on Yaj.II.145. The promoun 'tat' used in the compound 'tatpratyāsannānām' should, by context, refer to both the father and mother. But in Vi.Ta.467 only the father's heirs are admitted. See infra.

(3) Manu IX.192 supra.

(4) For 'ekaśeṣa' compound see Pan.su.1-2-64: "Satrūpānāmekāśeṣa ekavibhaktay."

plough the fields and so should Tom.' (1)

He understands Manu's provision about a brahmin step-daughter as referring to all her strīdhana (2) and to any step-daughter born of a co-wife of a superior caste. For śulka he adopts

- (1) "Sarve sahodarāḥ samam bhajeran sanābhayo bhaginyaścha samam bhajerananti itaretarayogasya dvandvaikaśeṣābhāvādapratipatteḥ. Vibhagakartritvānvayenāpi chaśabdasyopapatteḥ. Yathā Devadattaḥ kṛṣiṃ kuryāt Yajñadattaścheti." - Mit.on Yaj.II.145. The argument proceeding from the absence of the 'ekaśeṣa' is unconvincing; for Vijñāneśvara himself sets out the order of preference between the parents as first the mother and then the father in succession both to a male's property and to a female's property although he admits that at both these places they have been referred to with an ekaśeṣa compound. See the words 'pitarau' and 'pitrigāmi' in Yaj.II.137 and II.145 respectively and Vijñāneśvara's comments on them. The conjunction 'cha' (and) is used in four senses : Community (of reference), collateralness (of reference), mutual conjunction, and aggregation. The Siddhāntakaumudī says : "Anekaṃ subantaṃ chārthe vartamānaṃ vā śamsyante sa dvandvaḥ. Samuchchayānvachayetaretarayogasamāhāraśchārthaḥ." 'Itaretarayoga' is explained as 'militānāmanvayaḥ' as in 'dhavakhadirapalāsāḥ'. Vijñāneśvara probably means here that 'cha' denotes here only 'samuchchaya' which is explained as 'parasparanirapekṣasyānekasya ekasminnanvayaḥ' as in 'Isvaraṃ guruṃ cha yajasva'. - See Mr.Gharpure's notes to the Subodhinī on Mit.on Yaj.II.145. But Vijñāneśvara is self-contradictory here since commenting on another verse of Manu which contains almost identical verse (Manu IX.212 supra) he interprets 'cha' in the sense of 'itaretarayoga' to give uterine brothers and sisters a concurrent right to succeed equally to reunited brother's property - See the Mit.on Yaj.II.139. But the motive behind Vijñāneśvara's twisting of the texts which are opposed to the daughter's exclusive right is best expressed by Mitra Miśra who says, "Sāmānyataḥ strīdhanamātrasya duhitri-grāhyatābodhakānāmananyathāsiddhavachanānurodhena saṅkochaḥ kartavyo.... . Na cha chaśabdadvandvābhyām saḥādikāraḥ. Vibhagakartritvānvayenāpi tadupapatteḥ." - Vi.Mi.550.
- (2) Mit.on Yaj.II.145; Vi.Mi.550; Vi.Ta.453. Mitra Miśra mentions the order as the daughter of a superior rival wife and then the progeny of that daughter. Kamalākara takes this verse as referring only to 'paitrika' whereas Bālabhaṭṭa says that it denotes all the strīdhana of a woman howsoever acquired - Bal.on Mit. on Yaj.II.145. The preponderance of the authorities of the Benares school is in favour of the latter view.

the order given by Gautama viz. uterine brother and then mother.

Thus the two prominent characteristics of Vijñāneśvara's provisions are the favourable treatment to the female heirs and heirs taking through them and secondly, an absence of any distinction in the line of succession depending upon the kind or the source of strīdhana. Śulka alone forms an exception to the latter rule. Consistently with the name of his treatise⁽¹⁾ Vijñāneśvara deals with the line of heirs very briefly and after giving a short special line of succession to strīdhana he allows that line to merge into the line of succession to ^a male's property. Consequently after the husband and the father in approved and unapproved forms respectively the property of a childless woman practically devolves like male's property. Thus Vijñāneśvara's scheme of succession to strīdhana is as simple as his interpretation of the word strīdhana.

It is surprising to find that the two commentaries on the Mitākṣarā viz. the Subodhinī and the Bālabhāṭṭī do not contain any elaboration of the line of succession as stated in the Mitākṣarā. In the case of the Subodhinī it is understandable because it is a very concise commentary. But the case of the Bālabhāṭṭī is otherwise. Its author indulges in a long and elaborate discussion to show that a correct reconciliation of the smṛiti texts gives provisions which are exactly in conformity with the Mitākṣarā. He also takes great pains to refute the reasoning of the authors of the Bengal school who interpret the Śāstric texts in a manner entirely

(1) 'Mitākṣarā' i.e. 'consisting of few syllables'. The title was adopted also by Haradatta for his commentary on the sūtras of Gautama.

different from that of Vijñāneśvara. The whole discussion is very interesting for a Mīmāṃsaka but unfortunately not very helpful to a lawyer who requires a detailed, systematic and precise order of succession. However, both the commentaries support the general rules in the Mitākṣarā. This is quite in consonance with the principle that a commentary must explain and support the original work itself.⁽¹⁾

The other two commentaries on Yājñavalkya's smṛiti are the Dīpakalikā of Śūlapāṇi and the Vīramitrodaya of Mitra Miśra. It is important to note that Śūlapāṇi in his brief commentary mentions the son as an heir coming immediately after the daughter and not after the daughter's daughter and daughter's son as given by Vijnanesvara.⁽²⁾ Mitra Miśra in his Vīramitrodaya seems to think likewise.⁽³⁾ This shows that amongst the commentators of Yājñavalkya Vijñāneśvara was solitarily endeavouring to give a preference to the daughter's daughter and daughter's son over the son of the proposita herself.⁽⁴⁾

The next important authority in the Benares school, the Vīramitrodaya, is ambiguous on the point of initial order of succession.⁽⁵⁾ Mitra Miśra first gives three different lines of succession to yautaka, anvādheya and prītidatta together, and finally to the rest of strīdhana. The provisions mentioned here appear to be

(1) A tīkā is like a bhāṣya which is defined as :

Śūtrārtho varṇyate yatra vākyaiḥ sūtrānusāribhiḥ /
Svapadāni cha varṇyante bhāṣyam bhāṣyavido viduḥ //

(2) Di.Ka.on Yaj.II.117 interprets 'anvaya' as son, son's son etc.

(3) See Vi.Mi.(tīkā) on Yaj.II.145 : "Yadi tu prattā bhavati putraduhitrivina cha tadā duhitṛīnām cha taddhanam svam bhavati. Tadabhāve cha dauhitṛāḥ...."

(4) See also Viśvarūpa and Aparārka supra.

(5) This refers to the order amongst the progeny itself.

almost an exact reproduction of the provisions of the Smṛitichandrikā.⁽¹⁾ He then gives also a detailed extract from the Mitākṣarā on the same topic.⁽²⁾ After mentioning both these views he gives the best possible explanations for both these views but does not state his own preference.⁽³⁾ However as he takes much more pains to advocate Vijñāneśvara's view it is reasonable to hold that he is inclined to accept it.⁽⁴⁾ He then suddenly mentions that the order of succession viz. daughter, daughter's daughter, daughter's son, and son is accepted in the Mitākṣarā, Smṛitichandrikā, Madanaratna and the Mādhavīya.⁽⁵⁾ He then mentions Jīmūta's view and with pungent comments contradicts the same.⁽⁶⁾

For succession to a childless woman's strīdhana he accepts the provision of the Mitākṣarā with the following changes, namely,

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- (1) See Vi.Mi.546-49. For Smr.Cha. see infra. Like Devaṇṇa Mitra Miśra also refers to an unknown author, Devasvāmi, whose interpretation of yautaka is quoted and contradicted in the same way as is done in Smr.Cha.662 - see Vi.Mi.548.
 - (2) Ibid pp.549-50.
 - (3) Ibid pp.550-51.
 - (4) Ibid. See also Ibid p.552 where he parenthetically mentions the daughter's daughter as succeeding after the daughter according to Yaj.II.145. However, referring to the Gautamasūtra for preference amongst the daughters Mitra Miśra quotes, apparently with approval, the explanation of 'apratīṣṭhitā' as given in Vya.Ka.etc., namely, childless, unfortunate, widowed etc. But in actually laying down the order of succession he says that the strīdhana excluding the three categories devolves "upon the unstabilised daughters and in their default upon the stabilised daughters : upon the married daughters and in their default upon the widowed ones." The remark is hardly consistent with the explanation of 'apratīṣṭhitā'. For a similar remark see Vi.Ta.452. The provision is reminiscent of the law of the Bengal school. The same is the case with the explanation of Brihaspati's text. See infra.
 - (5) This is, of course, wrong unless he means to refer to the strīdhana excluding anvādheya, prītidatta and yautaka.
 - (6) Vi.Mi.551. See his remarks 'tanmandam' and 'Tasmāt śābdavyutpattyajñānamevedaṃ'.

that the Gāndharva is included in the approved forms of marriage on the authority of Manu; ⁽¹⁾ the succession in the case of approved forms goes to the husband's nearest heirs in default of the husband himself. The reason for the second provision, says Mitra Miśra, is that nearness (pratyāsatti) to the woman herself is included in the nearness to the husband alone. ⁽²⁾

After having severely criticised Jīmūta's interpretation of the verse of Yājñavalkya giving succession to a childless woman's strīdhana Mitra Miśra refers to the ultimate heirs mentioned by Bṛihaspati and gives the following order of heirs in accordance with it: ⁽³⁾ the daughter's son, son, son's son, son's son's son, step-son, step-son's son, and ⁱⁿ default of these heirs mentioned in the text viz. the sister's son etc. in accordance with their proximity. He mentions that these ultimate heirs succeed notwithstanding the existence of the other sapinḍas like father-in-law etc. because they have in their favour the strength of the textual authority. ⁽⁴⁾ The need for such an explanation lies in the fact that the heirs mentioned by Bṛihaspati are not necessarily in order of closest proximity to the husband which forms the basic test both according to Vijñāneśvara

(1) Manu III.196 supra.

(2) Vi.Mi.552 : "Svāmipratyāsatterbhartraivāntarāye bhartṛipratyāsatteraiva puraskaraṇīyatvāt."

(3) Vi.Mi.554. The first 'suta' according to Vi.Mi. includes step-son amongst the heirs; the second 'suta' includes the son's son and the step-son's son but does not include daughter's son's son as he does not offer any pinḍas to his father's mother's mother. The doctrine of spiritual efficacy is thus engraved upon the doctrine of propinquity. On the same principle and to avoid the breach of ancient custom (anādivyavahāravirodha) step-son and his son have been placed before the sister's son etc.

(4) Vachanabala for which see supra p.234. The explanation denotes that these heirs succeed after the husband.

and Mitra Miśra for determining the order of succession to strīdhana of a childless female married in one of the approved forms. Thus these heirs are nominated only as an exception to the general rule of proximity. Another exception to this rule arises in the case of females, who are generally declared to be incapable of having any inheritance.⁽¹⁾ So only those females who are expressly mentioned in the smṛiti texts are to be accepted as heirs under the rule of proximity.⁽²⁾

With this Mitra Miśra's chapter on strīdhana comes to an end. It is to be noticed that though he generally accepts the Mitākṣarā view on this point his interpretation of Bṛihaspati's text bears a great resemblance to that of the Bengal school and is directly contradictory to the simple rule of the Mitākṣarā. He also interprets it in such a way as to include, on the basis of spiritual efficacy, a few heirs even before the ultimate heirs.⁽³⁾ The same is the case with his preference to married daughters as against the widowed ones. But so far as the Courts are concerned the Vīramitrodaya does not mitigate the authority of the Mitākṣarā but only supplements it wherever the latter is silent; so from a judicial point of view only those provisions of the Vīramitrodaya which are in conformity with the Mitākṣarā can be accepted.⁽⁴⁾

(1) But see Vi.Ta. and Vya.Ni. infra.

(2) With a typically eloquent phrase Mitra Miśra says : "Śṛīṅagr-āhikayā yatra kaṇṭhoktaḥ 'patnī duhitara' ityādaḥ yāsāṃ strīṇāṃ dhanādhikāraśtāsāmeva." - Vi.Mi.554. What he means to say is that the widow, daughter and the mother who are mentioned as heirs in Yaj.II.135-36 are to be accepted as heirs only because one is cornered by the smṛiti text in their favour.

(3) See Vi.Mi.554 for the reason of including step-son and step-son's son and excluding the daughter's son's son.

(4) See infra.

Kamalākara seems to be in favour of giving a joint succession to unmarried daughters and sons in all kinds of strīdhana except yautaka.⁽¹⁾ He does not mention the further order of succession. He holds succession as given in the Mitākṣarā to be applicable to yautaka alone⁽²⁾ and gives the following order for the same : unmarried daughter, married daughter indigent daughter, married daughter who possesses wealth and has sons, barren or widowed daughters,⁽³⁾ daughter's daughters taking per stirpes, daughter's son, son, son's son, son's son's son, step-daughter, step-daughter's son,⁽⁴⁾ and

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- (1) Vi.Ta.452. The provision is similar to the one found in Vi.Ra.; Vi.Chi. etc. See infra. It is closer to Da.Bha. than Mit.
- (2) Kamalākara holds all the smṛiti texts giving preference to a daughter over a son and all the opinions of authors like Vijñāneśvara to the same effect to be referring to yautaka - see the remark 'etadyautakaparam' occurring in Vi.Ta.451 and 452.
- (3) Vi.Ta.452. The preference of the wealthy and the 'saputrā' daughters is unjustifiable. Kamalākara probably follows Mitra Miśra.
- (4) The reason for the preference of step-daughter and step-daughter's son is based upon Manu IX.183 which declares that all wives of a person become the mothers of a son in case one of them gives birth to a son. The reason could have been better applied to the step-son and not to the step-daughter, as has been done in Vi.Mi.554. But the right of a step-son is based, according to Kamalākara, upon his capacity to offer piṇḍas in default of the secondary sons like the kṣetraja etc. - See Brihaspati and Kātyāyana quoted in Vi.Ta.454 and 467 respectively. The former text is cryptic and is not found in other standard commentaries. The latter puts both secondary sons and step-sons together. It is significant that although on the authority of this latter text Kamalākara gives a right of succession to the step-sons he does not express anything about the right of the secondary sons who could have been accepted by him under the authority of the same text. As he does not do what one would have naturally expected him to do in this context it appears that his abstention is wilful; and this obliges us to conclude that according to him secondary sons are not entitled to succeed to their secondary mother's strīdhana. The application of the doctrine of spiritual efficacy, therefore, does not proceed any further than giving the right of succession to step-children. But see the next note.

step-son. But he adds that the husband succeeds in default of the step-daughter's son which means he succeeds before the step-son.⁽¹⁾ The inclusion of the step-children before the husband does not stand to reason in view of the fact that the system of succession to strīdhana prefers heirs of one's own body. The word 'sodara' (uterine) which is used in the smritis quite often bears an eloquent testimony of this principle. Therefore step-children should logically come in only in default of the husband himself and only as his nearest heirs. Moreover the very fact that Kamalākara mentions the provision of the devolution of the strīdhana of a lower caste woman upon her step-daughter or step-son of a superior caste as an exception to the rule that a childless woman's strīdhana devolves upon the husband,⁽²⁾ proves that in other cases the husband succeeds in preference to them. This in its turn proves that the woman would be regarded as childless notwithstanding the existence of the step-children. Again, as he includes the step-son on account of his capability to offer piṇḍas to the woman in default of the secondary sons like kṣetrajā etc. it is incomprehensible why he should not include along with the step-son the secondary sons as well.⁽³⁾ Although unlike Vijñāneśvara⁽⁴⁾

(1) For the order see Vi.Ta.453-54. However, Kamalākara mentions brother and his children before the step-daughter etc. which means that they succeed even before the husband. Their claim is based on their capacity to confer spiritual benefit. But see Vi.Ta.467 where these heirs are mentioned after the husband and along with the ultimate heirs mentioned by Bṛihaspati. The position allocated to these heirs in Vi.Ta.454 therefore appears to be a slip of the pen.

(2) Vi.Ta.453. For a similar statement see Vi.Mi.549.

(3) See supra Vi.Ta.454. In succession to a male's property Manu recognises the right of 6 out of the 12 kinds of secondary sons; Nārada recognises the right of three; but Yājñavalkya and Vṛiddha Hārīta recognise the right of all these sons. See Manu IX.159-60; Na.Smr.16.17 & Na.Sam.14.16; Yaj.II.132; Vri. Ha.VII.265-66. (4) See Mit.on Yaj.II.132.

and following Hemādri and Mādhava etc.⁽¹⁾ he declares only aurasa and dattaka to be heirs to a male's property he amends his proposition by admitting into the list of heirs krīta, svayamdatta and kṛitrima on account of their resemblance to a dattaka.⁽²⁾ They could equally be held to be entitled to succeed to a female's property as well. But he does not appear to be prepared to admit this. Hence his provisions about the position of the step-children as heirs to their step-mother's strīdhana sound to be self-contradictory.

In the next passage he again refers to many different texts and opinions of authors and settles the order as the husband and then other heirs who are nearest to the husband in the compact series of heirs given by Yājñavalkya i.e. the co-wife, step-daughter etc.⁽³⁾ Apparently he gives this provision as the opinion of Vijñāneśvara. The whole discussion is highly confusing and unworthy of an erudite author like Kamalākara.⁽⁴⁾ But after mentioning the text of Brihaspati about ultimate heirs he gives the final order as follows : Step-daughter, step-daughter's daughter, step-daughter's son, step-son, step-son's son, husband, husband's brother, husband's brother's son, sister's daughter or son, husband's sister's son, husband's younger

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- (1) Vi.Ta.364. See Dr.J.D.M.Derrett : Adoption in Hindu Law, Zeitschrift für vergleichende Rechtswissenschaft (1957) 34 at p.42-43. See also Śaunaka cited in Apa.on Yaj.II.132 etc.
 (2) Vi.Ta.364.
 (3) Vi.Ta.462. The order mentioned in Yaj.II.135-36 refers to the property of a sonless deceased male.
 (4) See the discussion in Vi.Ta.454-55 continued on p.462. Probably this refers to the opinions of different authors and is given by Kamalākara only to exemplify his introductory remark that the topic of strīdhana is full of controversies amongst the different authors. - See Vi.Ta.437.

brother's son, brother's son, son-in-law, and husband's younger brother.⁽¹⁾ He seems to extend the same rule to the cases where the succession goes to the mother, and then to the father so that after the father it devolves upon his nearest heirs as determined by the compact series of heirs viz. the step-mother, sister, step-sister etc.⁽²⁾ He, however, mentions that sister's sons etc. succeed only in default of the sister herself. As he mentions the sister and sister's daughter as heirs it would have been reasonable on his part to have accepted all the female heirs corresponding to the males in the line of ultimate heirs.⁽³⁾

Kamalākara being the author who gives probably the most detailed line of succession according to the Mitākṣarā school it is lamentable that his clumsy way of stating his provisions has distorted what otherwise would have been a smooth and a harmonious system.

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- (1) Vi.Ta.467. Here again Kamalākara inserts the husband's brother and his brother's son before the sister's son and daughter. This is again a slip of the pen as these heirs occur much below in the text of Bṛihaspati and as Kamalākara holds that the heirs mentioned in this text succeed in the order of their enumeration.
- (2) One interesting point ought to be noted here. In case the proposita was married in an approved form it is quite reasonable to hold, as Mitra Miśra suggests, that succession devolves; in default of the husband, upon the nearest heirs of the husband; for the nearest sapinḍas of the woman and her husband would be the same. But in case the proposita was married in an unapproved form it would be more reasonable to hold that succession devolves, in default of the father, upon the nearest heirs of the mother and then upon the nearest heirs of the father; for it is quite possible that the mother of the proposita was also married in an unapproved form and in such case the mother's nearest heirs would be her heirs in her parental family and not necessarily the nearest heirs of the father.
- (3) Vi.Ta.467. See Varadarāja's suggestion to this effect infra.

As regards succession to śulka and to strīdhana of a maiden he accepts the standard provisions of Gautama and Baudhayana respectively. (1)

The Bhāgaviveka of Bhaṭṭa Rāmājīta who avowedly and closely follows Viññāneśvara (2) may be considered to be authority of the Benares and the Bombay school. It is remarkable that this author almost religiously follows the Mitākṣarā provisions about succession to strīdhana. His affinity towards Viññāneśvara is indeed so great that like Viññāneśvara and unlike almost all his followers Bhaṭṭa Rāmājīta includes Gāndharva, for the purpose of succession, into unapproved forms. (3) This is probably representative of the trend amongst the later authors to revert to the position of the Mitākṣarā itself by taking a leap over all the improvements, amendments and additions made by the intervening authors. The very fact that even Bālabhaṭṭa who gives a detailed discussion in favour of the Mitākṣarā order of succession does not try to add a single provision himself supports such a conjecture.

Nīlakaṇṭha and Viññāneśvara differ from each other in setting out the order of succession to strīdhana in the same way in which they differ in interpreting the word strīdhanā itself.

(1) For śulka see Vi.Ta.463; for maiden's property see Vi.Ta. 453 & 455.

(2) Like Kavikāntasarasvatī and Durgayyā Bhaṭṭa Rāmājīta was one of those peculiar authors who wrote both their own verses and commentaries on such verses. They probably did so to simplify the enunciation of the law and to facilitate the explanation. The practice was, however, more common in the sphere of poetics rather than of law. The ms. in I.O.L. appears to have been procured by Colebrooke from Baroda.

(3) For provision on succession to strīdhana see Bha.Vi.f.9(b) - 10(a). They are almost the same as those in the Mitākṣarā.

Discarding Vijñāneśvara's interpretation of Manu's verse⁽¹⁾ Nīlakaṇṭha gives a simultaneous right of succession to the unmarried daughters and sons in anvādheya (post-nuptial gifts) and prītidatta (gifts from the husband).⁽²⁾ On the failure of the unmarried daughters the married daughters share equally with the sons.⁽³⁾ The author does not mention any further order in these two categories.

As regards the rest of strīdhana Nīlakaṇṭha appears to have accepted the Mitākṣarā order of succession with the following few amendments:-

(1) He accepts only indigent daughters under the word 'apratiṣṭhitā'.⁽⁴⁾

(2) He appears to give a simultaneous succession to daughter's daughters and daughter's sons and gives them a right of succession per stirpes.⁽⁵⁾

(3) He considers the Gāndharva form to be an approved one in the case of Kṣatriyas etc. to whom the Śāstra allows this form.⁽⁶⁾

(4) The nearest heirs of a woman in default of the husband and the father in approved and unapproved forms respectively are

(1) Manu IX.192 supra.

(2) Vya.Ma.157-58. He relies on Manu IX.195 supra. Although he introduces this opinion as the one held by some others (pare) it is definitely followed by Nīlakaṇṭha himself since his further provisions are based upon the acceptance of this alone.

(3) Vya.Ma.158.

(4) Vya.Ma.159. This is identical with Mit.on Yaj.II.117 but not on Yaj.II.145. See supra.

(5) Vya.Ma.159. Commenting on Nārada's 'anvaya' he says, "Duhitrīṇāmabhāve duhitṛisantatiḥ." He then appears to apply simultaneously the rule of succession per stirpes to both daughter's daughters and daughter's sons.

(6) Vya.Ma.161.

those who are related to the woman through these two persons and are in their respective families.⁽¹⁾

(5) As regards the right of a brahmin step-daughter to succeed to her step-mother's strīdhana Nīlakaṇṭha is reluctant to extend the same right to daughters of all superior castes.⁽²⁾

The statement made in (4) above is more of the nature of an explanation of, than an amendment to the Mitākṣarā provisions and appears to be similar to the interpretation given by Kamalākara.⁽³⁾ The above-mentioned order refers only to the so-called technical (pāribhāṣika) strīdhana. It would be quite appropriate, therefore, to consider the Mitākṣarā order of succession in conjunction with the above amendments as being applicable according to Nīlakaṇṭha to all the technical property of a woman excluding her anvādheya and prītidatta. The same order should be made applicable to the last-mentioned two categories in default of the married daughters and sons.

However, for the so-called non-technical strīdhana⁽⁴⁾ which is not strīdhana at all according to Nīlakaṇṭha, and which is

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- (1) Vya.Ma.161. He says that according to Manu IX.187 the nearest heirs of the proposita succeed. To establish the identity of this with the Mitākṣarā provision in this respect he says : " ... tatrāpi tenāsyāḥ pratyāsannāstatpratyāsannāstadvārā tatkule pratyāsannā iti yāvaditi vyākhyeyam." Although he mentions the verse of Bṛhaspati giving the ultimate heirs it is hardly of any significance in view of the above clear-cut explanation and because of the absence of any attempt at co-ordination between the two provisions.
- (2) Vya.Ma.159. See 'mānam tu tatra chintyam' But since he is not flatly opposed to the Mitākṣarā provision he may be considered to have acquiesced in it.
- (3) See supra. Kamalākara applies Yaj.II.135-36 in determining the heirs in default of the husband or father.
- (4) See supra.

referred to by him only as mother's property⁽¹⁾ a different order is specified. The author says that all the above texts of Gautama⁽²⁾ etc. which refer to succession to strīdhana and also all the texts of Manu⁽³⁾ etc. which do not directly refer to strīdhana but which have a similar purport (i.e. those which in some way or the other accept daughters as the first preferential heirs) are to be taken as referring to the technical property of a woman.⁽⁴⁾ As regards the non-technical property of a woman the relevant text is that of Yājñavalkya which confers upon the sons a general right of dividing their parents' property;⁽⁵⁾ hence, he says, the non-technical property of a woman such as that acquired by labour, partition etc. is succeeded to only by the sons etc. notwithstanding the existence of the daughters.⁽⁶⁾ The provision for 'the sons etc. only' (putrādaya eva) as being heirs is similar to that of authors of the Bengal school who consider such property to be the husband's property and prescribe the same order of succession to such property as to the property of a male.⁽⁷⁾ Moreover it has been conclusively proved that property acquired by a woman with her own labour and gifts given to

(1) Vya.Ma.160 : "Mātrīsvāmīkadhanamātra" and "Pāribhāṣikātrīktaṁ mātrīdhanam".

(2) Gau.Su.28.22 supra.

(3) Manu IX.192 and IX.131 supra in which the word strīdhana does not occur but according to which the daughter succeeds as the most preferential heir and in preference to or along with the son.

(4) "... Gautamādivachanāni pāribhāṣikaparāṇyeva. Yāni tu strīdhanapadābhāve'pi ekārthakāni tānyapētatparāṇyeva. Ekamūlakalpanālāghavāt." - Vya.Ma.160.

(5) Yaj.II.117 - Vya.Ma.160.

(6) "Tena pāribhāṣikātrīktaṁ mātrīdhanam duhitṛisattve putrādaya eva labheran." - Vya.Ma.160. He explains non-technical property as 'vibhāgakartanādilabdhaparam."

(7) See Da.Bha.Di. of Raghurama ^{supra} 115. See also Vi.Sa.infra.p.361 and Da.Da.Sa.infra.p.375.

her by strangers constitute, according to Nīlakaṇṭha, her husband's property. As in the above provision property acquired by a woman with her own labour is classified by Nīlakaṇṭha with property acquired by a woman by partition etc. it is clear that he wants all such non-technical property to devolve as if it were the husband's property. The inference that Nīlakaṇṭha wants to treat, for the purpose of succession, the non-technical property of a woman as if it were a male's property is supported by the fact that after giving the above-mentioned lines for the technical and non-technical property of a deceased woman leaving children Nīlakaṇṭha continues to state the line of succession to the technical property of a childless woman but not to her non-technical property.⁽¹⁾

Coming to the law of the Mithila school we find that the Kṛityakalpataru of Lakṣmīdhara does not help us much in ascertaining the order of succession though it contains many of the smṛiti-verses on the topic.⁽²⁾ Two suggestions are, however, to be considered from this ancient treatise for the purpose of fixing the line of succession according to the Mithila school and by analogy, according to all other Mitākṣarā shb-schools. The word 'apratīṣṭhitā' is explained in this treatise as including indigent, widowed, unfortunate

(1) See Vya.Ma.160 where succession to non-technical property of a woman has been parenthetically introduced between the lines of succession to the strīdhana of a woman leaving children and to that of a childless woman.

(2) Vya.Ka.690-92.

and childless daughters.⁽¹⁾ The suggestion has been accepted in the Ratnākara and the Vivādashintāmaṇi as well. Secondly, pertaining to the provision about a brahmin step-daughter Lakṣmīdhara says that she succeeds in default of the husband himself.⁽²⁾ This provision is given also in the Ratnākara but not in the Chintāmaṇi and is also contrary to the suggestion of Mitra Miśra and Kamalākara.⁽³⁾ Hence it should be discarded in favour of the latter. Moreover it would also create a conflict in cases wherein succession devolves upon the father and his sapindas.⁽⁴⁾

Viśveśvarabhaṭṭa, the author of the Madanapārijāta, accepts the same order as given in the Mitākṣarā⁽⁵⁾ adding the following particulars:-

(1) For the purpose of explaining the line of succession in default of the husband or the father he gives the same explanation as the one given by Nīlakaṇṭha.⁽⁶⁾

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- (1) Vya.Ka. : "... vivāhitāpi nirdhanabhartrikā durbhagā anapat-yāścha." The same explanation appears in Vi.Ra.517; Vi.Chi.142; Vi.Cha.74; Vi.Sa.f.69(a) all of which belong to the Mithila school. The word 'nirdhanabhartrikā' is a compound which can also be solved so as to mean one whose husband is poor. But the above translation is given in accordance with the opinion of Smr.Cha.; the Subhodhini; Vi.Mi.etc. However, Ma.Pa.664-65 gives only 'indigent'.
- (2) Vya.Ka.690.
- (3) See supra. They say that this is an exception to the provision that the property of a childless female devolves, in case she was married in an approved form, upon the husband i.e. such step-daughter succeeds before the husband.
- (4) For, she would, by analogy, succeed after the father. But then this would come in conflict with the provision that the father's nearest heirs succeed after him.
- (5) See Ma.Pa.664-68. Although it is better to treat Viśvesvara as an authority of the Benares school he has been accepted by their Lordships of the Privy Council as an authority of the Mithila school. See infra.
- (6) Ma.Pa.665-67.

(2) After the sons (which must include son's sons also) he gives succession to the step-sons⁽¹⁾ and as an exception to this order he states that in a case where the only heirs of a woman are her step-daughter by a co-wife of a superior caste or such daughter's son, and a step-son by a co-wife of an inferior caste, the former succeeds in preference to the latter.⁽²⁾ He also mentions as a corollary that where both the step-daughter and the step-son are born of the co-wives of higher caste the latter succeeds in preference to the former.⁽³⁾ Apparently he seems to put the step-children before the husband probably considering them as 'apatya' (progeny) of the woman.⁽⁴⁾

Chāṇḍeśvara is not very helpful in determining the order of succession according to this school. He briefly mentions that on the authority of Manu and Bṛihaspati only unmarried sisters share their mother's strīdhana with their brothers.⁽⁵⁾ He interprets the sūtra of Gautama as not denying the right of the sons but as admitting the right of the daughters to succeed to their mother's strīd-

(1) To follow the whole point the following sequence ought to be noted. "Ityanvayaśabdopāttāḥ putrapautrādayāḥ krameṇa dhana-bhājāḥ. Yā bhaginyāḥ sāksātsvamātrīduhitarāḥ tadabhāve taddauhitraparyantāḥ tadabhāve sahodarāḥ. Mṛitāyāḥ sāksāt-putrā na sapatnīputrāḥ... . Svaputrābhāve sapatnīputrādayāḥ." - Ma.Pa. 667. The word 'ādayāḥ' underlined above suggests that step-children also come under the term 'anvaya' so that they are entitled to succeed before the husband.

(2) Ma.Pa.667.

(3) Ma.Pa.668. The body-particles of the proposita can be found neither in the step-son nor the step-daughter; therefore apparently the former appears to have been given a preference only on the ground of spiritual efficacy.

(4) Ma.Pa.665 supra.

(5) Vi.Ra.516.

hana.⁽¹⁾ This comment makes it amply clear that the sons have a privileged place in the mind of this author. Only as regards prīt-idatta i.e. gifts given by the father and yautaka i.e. nuptial gifts he seems to adopt the Mitākṣarā order of succession.⁽²⁾ Like Vijñāneśvara he also appears to regard the words 'given by the father' appearing in the provision about a brahmin step-daughter as being representative of all strīdhana. Like Lakṣmīdhara, however, he puts such step-daughter after the husband. As regards succession to the strīdhana of a childless woman he accepts almost the exact Mitākṣarā order and there is nothing notable in the same. Though he mentions Bṛihaspati's text about the ultimate heirs,⁽³⁾ he does not make any noteworthy comment which might help us to determine the order of succession amongst these heirs and the heirs determined by the general rule of proximity to the husband or the father as the case may be.

Vāchaspati gives almost the same provisions as given by Chanḍeśvara.⁽⁴⁾ He does not, however, refer to the text of Bṛihaspati at all. This brings him nearer to the Mitākṣarā so far as succession to strīdhana is concerned. The Vivādashandira of Miśra and the Vivādashārārṇava of Sarvoru Śarman divide strīdhana

(1) This is, of course, perverse since the sūtra, to whatever property it may be held to apply, gives a right to the daughters obviously to the exclusion of the sons. It is true that it does not negative the right of the sons totally but does not anticipate the concurrent right of the sons with the daughters. But see Maskari's comments supra.

(2) Vi.Ra.517-18.

(3) The text occurs also in Vya.Ka.693 without any comments of the author.

(4) Vi.Chi.142-43.

into the same two categories, namely, yautaka and the rest of strīdhana.⁽¹⁾ However, unlike the Ratnākara Prītīdatta is not, for the purpose of succession, paired with yautaka in these two treatises.⁽²⁾

Most of these digests of the Mithila school mention that in the strīdhana except yautaka the unmarried daughters and the sons share equally with only a small portion to be given to a married daughter for the sake of maintaining her prestige.⁽³⁾ It may be concluded, therefore, that the married daughters also should share with the sons in default of the unmarried ones. Such being the case, the order of succession to this strīdhana appears to be similar to the one given by Nīlakaṇṭha in respect of anvādheya and prītīdatta.⁽⁴⁾ Therefore it is reasonable to conclude that according to the Mithila school the order of succession applicable to Yautaka and Prītīdatta is the order given in respect of general strīdhana in the Mitākṣarā, whereas the order applicable to the rest of the strīdhana is the order applicable, according to the Mayūkha, to anvādheya and prītīdatta.⁽⁵⁾ About śulka and maiden's property there is hardly any difference in the Mitākṣarā sub-schools, hence the order given in the Mitākṣarā may be considered as standard according to all the sub-

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- (1) Vi.Cha.74; Vi.Sa.f.69(b). Although in both these treatises only sons have been mentioned as being capable of dividing the strīdhana except yautaka it is evident by the context of Manu IX.192 that the authors mean to give^{in it} an equal right to both the sons and daughters in it.
- (2) Vi.Sa.69(a) contains an explanation of Yautaka as property given to a woman at the time of nuptials by the father etc. The same explanation is given also in Vi.Chi.142. But Prītīdatta is a more comprehensive term.
- (3) Vi.Ra.516; Vi.Chi.143; Vi.Cha.75.
- (4) See supra.
- (5) See supra. Brihaspati's text may be neglected here also as in the case of the Benares and the Bombay schools.

schools. But although property acquired by inheritance etc. is, in this school, admitted as strīdhana by Sarvoru Śarman⁽¹⁾ he lays down like Nīlakaṇṭha that wealth earned by a woman with labour and gifts given to her by strangers, belong to the husband and are divisible by the sons alone.⁽²⁾

Amongst the authors of the Southern School the earliest viz. Bhāruchi is not very helpful in ascertaining the detailed order of succession according to this school. Apparently he does not appear to divide strīdhana into several categories for the purpose of prescribing different lines of succession amongst the progeny themselves.⁽³⁾ Commenting on Manu's verse⁽⁴⁾ he says that both married

(1) See supra p.81.

(2) Vi.Sa.f.71(a).."Sampodhikaṃ (?) sukauśalagānaśilpādito anyair-yaddattaṃ svato vāṇijyayā kartanādinā vā labdhaṃ tat patyureva. Putramātravibhajanīyaṃ cha." (Whatever is acquired by a woman by her good skill or by singing or with the help of any of her arts, whatever is given to her by strangers, and whatever she gains in business or by spinning belongs to the husband alone. It can be partitioned by the sons only). This provision throws some light on Nīlakaṇṭha's provision as regards succession to the so-called non-technical strīdhana. See supra.

(3) Although he refers to Manu 9.131 and 9.195 he does not say that the order of succession given in them is limited to the kinds of strīdhana mentioned in them, namely, yautaka in the former and anvādheya and prītīdatta in the latter. See ms.f.82(b)-83(a)=S.O.A.S.

(4) Manu 9.192. He also considers 9.193 to determine the order of succession in default of the daughter, but after having quoted the verse he simply says : "ūḍhānāmanūḍhānāṃ cheti kṛitavichār-ametat" and adds that a gift to a daughter's daughter is not compulsory. But such a gift depends upon the quantum of the wealth to be divided and the needs and merits of the daughter's daughter according to Vya.Ka.688, Smr.Cha.661. Devaṇṇa and Mitra Miśra say that a daughter's daughter is entitled to a one-fourth share in the same way in which a daughter is entitled to a one-fourth share in her father's property; but they say that the only difference is that in the former case the share is not compulsory whereas in the latter it is compulsory on account of the sentence of denunciation (doṣakīrtana). - Smr.Cha.661-62, Vi.Mi.547. Devaṇṇa adds that whereas in the latter case there is ownership by birth in the former there is no ownership at all.

and unmarried daughters succeed, though in the opinion of some (kechit) only unmarried ones succeed; but he does not refer to the son's right at all, implying thereby that the sons can succeed only in default of all the daughters.

His comments on other verses are neither elaborate nor clear. In dealing with succession to the strīdhana of a childless woman, however, he affirms the position characteristic of the Mitākṣarā⁽¹⁾ and he also confirms in toto the provisions we find in the Mitākṣarā about a brahmin step-daughter.⁽²⁾ The very fact that Bhāruchi refrains from dividing strīdhana, for the purpose of succession, into different kinds brings him nearer to Vijñāneśvara and his system of strīdhana succession.

Another early author who may be considered to be of the Southern School is Kavikāntasarasvatī. Unlike Bhāruchi he is quite unambiguous though sometimes inconveniently cryptic; but he devotes to this topic of strīdhana succession a few lines which sufficiently show that his provisions are in complete accord with those of the Mitākṣarā.⁽³⁾

The leading author of this school viz. Devaṇṇa, however, develops a system of succession quite inconsistent with that of the Mitākṣarā. He divides strīdhana into three different categories :

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- (1) Manu IX.196-7. But he includes Gāndharva in approved forms.
 (2) Manu 9.198. See ms.f. 83(a) = S.O.A.S. copy P. 291.
 (3) Viśvādarśa S.O.A.S.ms.f.57b. This author who writes both verses and his own commentary has cleared up all the muddle created by the word 'anvaya': he uses a genitive of 'mātri' in a long compound: "Māturduhitṛidauhitṛīdauhitṛeṣu dhanam bhavet/ Pūrvābhāve paraḥ paśchāt putrapautrapatiṣvapi// - Vis.f.57b.

anvādheya and prītidatta together, yautaka, and the rest of strīdhana. He specifies a different order of succession for each of them.

Depending upon Manu and Brihaspati⁽¹⁾ he declares that anvādheya and prītidatta strīdhana devolve simultaneously upon the sons and the daughters excluding the widowed ones.⁽²⁾ In yautaka, which he interprets as nuptial gifts, he recognises the right of the unmarried daughters alone.⁽³⁾ As regards the rest of strīdhana he gives a detailed order of succession which tallies with the general order of succession which is given in the Mitākṣarā,⁽⁴⁾ except for

- (1) Manu 9.192 & 195. Brihaspati : "Strīdhanam syādapatyānām .. etc." supra. - Smr.Cha.660-1. 'Cha' is taken in the sense of 'itaretarayoga', for the explanation of which see supra p.342.
- (2) Commenting upon the word 'sabhartrikāḥ' in Kātyāyana's verse Devaṇṇa says : "Sabhartrikā iti viśeṣaṇam vidhavānivṛityartham. Na punaḥ kanyānivṛityartham, pūrvoktavachanavirodhāt." Smr.Cha.661. The reference here is to the preceding text of Brihaspati. Incidentally from Manu 9.195 Devaṇṇa concludes that the sheer existence of the children after the death of the proposita is the cause of their acquirement of ownership : "Evañcha asmādi-damavagamyate - dhanasvāmīna ūrdhvaṃ dhanāgamane dhanasvāmīna-raṇāntarakṣaṇajīvanakriyaiva dhanagrahaṇādikāritayā dharmasā-Strapratipāditajanasya svatvāpattikāraṇamiti." Smr.Cha.660. But he describes the kinds of strīdhana coming under this verse as 'riktha' (Sma.Cha.661-662) which he himself explains, at another place, as property in which a person has right by birth - Smr.Cha.603. Compare also his remark about the right of daughter's daughter supra.
- (3) After having referred to the succession to the above categories of strīdhana Devaṇṇa introduces Manu 9.131 by saying : "Anyat kiñchit mātṛikam riktham aprattānāmeva na punaḥ sarvāsām duhitṛisodaraprajānām bhavatītyāha sa eva." Smr.Cha.662.
- (4) Smr.Cha.663. He introduces succession to the third category by saying : "Evamuktaṃ trividhavyatiriktaṃ mātṛikam riktham kumārī-nāmakumārīnāmapyapratiṣṭhitānāmeva, na punaḥ sarvāsām duhitṛī-nām ityāha Gautamaḥ." - ibid 662. The words 'na punaḥ sarvāsām' denote only this much that all daughters do not succeed in the first instance to the respective category of strīdhana. Otherwise there will be no heir to yautaka in default of an unmarried daughter - a contingency least expected by any commentator. Moreover after making the same remark Devaṇṇa gives a detailed order of succession to the third category in default of unmarried and unstabilised daughters. - Smr.Cha.663-4.

the fact that both unmarried and unstabilised daughters succeed together.⁽¹⁾

As regards anvādheya and prītidatta as well as yautaka he does not mention the heirs next to those who have already been mentioned above. It is evident that the provisions mentioned above refer only to the first preferential heirs in the three divisions of strīdhana; for after having stated that only unmarried and unstabilised daughters succeed to the third division of property, i.e. the rest of strīdhana, Devaṇṇa gives a further line of succession in respect of such property.⁽²⁾ Accordingly, although he expressly excludes widowed daughters from sharing with brothers in succession to anvādheya and prītidatta such exclusion must not be taken, as most of the leading scholars seem to think, as laying down a total denial of a widowed daughter's right to such property.⁽³⁾ The exclusion denotes only a denial of her right of becoming an heir of first preference in the first division.⁽⁴⁾ The same is the case with married and widowed daughters in the second division, i.e. yautaka, and of married stabilised daughters in the third division of strīdhana.⁽⁵⁾ It may be suggested here that the order which is applicable

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- (1) Smr.Cha.663. Apparently Devaṇṇa takes 'cha' as denoting 'itare-tarayoga' - an interpretation put forward by the oldest commentator on the Gautamasūtras i.e. Maskari and probably also by Bhāruchi.
- (2) See supra for the words 'na punaḥ sarvāsām' occurring twice in Smr.Cha. For including daughter's daughter in the word 'anvaya' used by Yājñavalkya and Nārada Devaṇṇa remarks: "Strīgāmidhanatvāt strīrūpānvaya iti cha gamyate." The explanation brings him nearer to Vijñāneśvara.
- (3) See for instance Banerjee p.451.
- (4) i.e. Anvādheya and prītdatta.
- (5) It may be mentioned here that a widowed daughter is an heir of first preference in the third category as Devaṇṇa, following Aparārka, includes her in 'apratishṭhitā'.

to the third division, i.e. rest of the strīdhana, should also be considered as applicable to yautaka but for the exception that the unmarried daughters succeed in preference to the unstabilised daughters.⁽¹⁾ In the case of the first division, however, it is reasonable to admit widowed daughters after the sons and married daughters⁽¹⁾ and in their default the succession should jointly devolve, by parity of reasoning,⁽²⁾ upon both the male and female issue of both sons and

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- (1) Jīmūta gives a right of succession to the barren and widowed daughters in default of other daughters in yautaka and in default of step-son's son in other categories. See *infra*. But only first alternative must be accepted in interpreting Smr.Chā. as unlike Jīmūta Devaṇṇa does not admit spiritual efficacy as the guiding principle of determining the preferential right of an heir. Moreover his interpretation of the word 'parjā', in Manu 9.195 as including both male and female progeny coupled with his explanation that the existence of the heir after the death of the proposita is the only cause of heir's ownership conclusively proves that a widowed daughter must be admitted in the above-mentioned position as prajā of the proposita.
- (1) The authors of the Bengal School give a right of succession to barren and widowed daughters in default of other daughters in yautaka and in default of a step-son's son's son in other categories. See *infra*. Only the first part must be accepted in interpreting Smr.Chā. as Devaṇṇa, unlike Jīmūta, does not admit the principle of spiritual efficacy as his guiding principle. Moreover his interpretation of the word 'prajā', in Manu IX.195 as including both male and female progeny of a woman, as coupled with his explanation that the existence of an heir after the death of the proposita is the only cause of ownership conclusively proves that a widowed daughter must be admitted in the above-mentioned position as 'prajā' of a woman.
- (2) For such parity of reasoning see Da.Bha.4.2.11 wherein Jīmūta prefers son's sons to daughter's sons because initially a son is preferred to a married daughter. Thus the relative strength of two heirs can be traced by judging the relative strength of the two nearer heirs in whose footsteps the former ones tread (sthānapātīva). See also Da.Bha.4.3.37 and the commentaries of Śrīnātha and Maheśvara on the same. In the present case as Devaṇṇa accepts the simultaneous right of sons and daughters it is reasonable to hold that both male and female progeny of both these heirs should succeed simultaneously.

daughters i.e. son's sons, daughter's daughters and daughter's sons.⁽¹⁾
 After these the order should be the same as in the case of the third category.

In the third category Devaṇṇa admits the Mitākṣarā order of succession with the following amendments or additions:

(a) He gives both unmarried and unstabilised daughters a joint right of succession.⁽²⁾

(b) He extends per stirpes succession even to son's sons.⁽³⁾
 For this he depends upon the analogy of succession to the property of the paternal grandfather. The analogy is, of course, hopeless, since unlike the other case, in strīdhana succession the sons and the son's sons do not have a simultaneous right of succession and the existence of the former completely excludes the latter. Moreover as, according to Devaṇṇa, the physical existence of an heir after the death of the proposita is the only cause of his or her ownership in such property⁽⁴⁾ the doctrine of representation becomes immaterial here since it is applicable with greater propriety to children succeeding simultaneously with the progeny of a pre-deceased child

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- (1) Son's daughter has not been included in this group as she appears to have been excluded in all the commentaries: this is striking and the reason may be that females were expected to inherit only sāmpradāyika for which see supra p.312.
 (2) Smr.Cha.663. This is quite in consonance with the natural construction of Gau.Su.28.22. Both Vijñāneśvara and Jīmūta artificially interpret 'cha' so as to include stabilised and married daughters respectively. See Mit.on Yaj.2.143, Da.Bha.3.2.23 and the explanation of Śrīkṛṣṇa. Achyuta commenting on the passage specifically repudiates a suggestion that 'cha' denotes 'samuchchaya': he incorrectly ascribes this opinion to Chaṇḍeśvara who refers to this interpretation as that of Halāyudha. See Vi.Ra.
 (3) Smr.Cha.664.
 (4) See above.

upon a fiction that such pre-deceased child⁽¹⁾ exists at the time of the death of its parents and takes its own share.

(c) He includes the Gāndharva form among the approved forms of marriage.⁽²⁾

(d) Depending on Kātyāyana and Yama, he says that where a woman is married in one of the three unapproved forms property which is given to her by her father, mother, brother, etc. (and not all her property) devolves upon the mother, father, etc.⁽³⁾ In default of these heirs even this property goes to the husband himself in such cases.⁽⁴⁾ The basis of such provision appears to be the general reasoning that strīdhana should preferentially devolve upon those who have given the same.⁽⁵⁾

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- (1) Thus in succession to the paternal grandfather's property notwithstanding the existence of the sons, the sons of a pre-deceased son come in simultaneously with the sons as heirs.
- (2) Smr.Cha.664, Pa.Ma.373, Sa.Vi.385, Da.Slo.f.40(b). Durgayyā however says that the Gāndharva form is included in the case of Kṣatriyas etc.
- (3) Smr.Cha.664-5. For this conclusion Devaṇṇa depends upon the verses of Kātyāyana and Yama and explains the word 'pradīyate' in the latter's verse as : "pitreti śeṣo dṛiṣṭavyaḥ." Durgayyā supports this conclusion (Da.Slo.f.42a & b) and gives the order as the father and then the mother. Alternatively he suggests that the father and mother are individually preferential heirs in that part of the property which is given by them individually. He emphatically suggests that even in the case of unapproved forms the parents get nothing except property given by their family. - Da.Slo.42b-43a.
- (4) Smr.Cha.665 : "Evaṃ pitṛivyaḥrātrīmātulādibandhudattam strī-dhanam sati sambhave pitṛivyaḍibandhūnām, anyathā bharturevet-yāsuraḍiṣu avagantavyam." This is a unique statement for it suggests that even in unapproved forms the wife does acquire some kind of 'sāpinḍya' with the husband. See infra.
- (5) See supra. See also Smr.Cha.667 : "Śeṣeṣu dhanadātaiva." See also P.321. P.368 note 4.

(e) He explains Brihaspati's texts as giving heirs who are entitled to succeed, in order of enumeration, to the property of their secondary mothers (gaṇamātri). He then remarks : "In the same way alone (evameva), the progeny of a co-wife should succeed to the property of their subordinate mother in default of her own progeny or husband.⁽¹⁾ The analogy shows that the above heirs also succeed only in default of the husband.⁽²⁾

(f) As an exception to the above rule the Brahmin step-daughter and her issue (santati) succeed to the property of their step-mother before the husband etc.⁽³⁾ But the rule is not applicable to a case where both the co-wives are equal, namely, in Devaṇṇa's words, of the same caste as that of the husband. In such case the husband is the heir in approved forms and the giver of the property (dhanadātā) in the rest of the forms.⁽⁴⁾

The provision about the sister's son etc. and the step-children raises an interesting question as to whether an adopted son also is entitled to inherit. Moreover the authors of the Mitākṣarā School have left uncertain the exact relative location of

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- (1) Smr.Cha.666; Almost the same words repeated in Sa.Vi.386; that they succeed in order of enumeration is accepted also in Pa.Ma.374-75. But see Varadarāja and Durgayyā infra.
- (2) But see the Bengal law which puts step-son etc. before the husband.
- (3) Smr.Cha.666.
- (4) Smr.Cha.666-67. The rule that in unapproved forms the giver of property is the heir has only one exception: in laying down succession to śulka Devaṇṇa says : "Taddātāro varādayaḥ, teṣāṃ dātrīve'pi taddhanam na bhavati." - Smr.Cha.665. See also Pa.Ma.373 etc.

all these 'subsidiary' sons⁽¹⁾ in the line of succession.⁽²⁾ An attempt to fix their relative positions will be made below. However, it must be noted here that according to all the authors of this School these subsidiary sons succeed after the husband - a fact which shows that they do not treat these sons as the issue (prajā) of the woman herself.⁽³⁾ Secondly, it ought to be noted that the adopted son who holds an important place in succession to the male's property has no place whatsoever as a son in succession to strīdhana. For the word 'sahodara' (uterine) as used by Manu and as explained by all the commentators would preclude anybody except the woman's own natural descendants from being included in her 'progeny'.⁽⁴⁾ Moreover while discussing the order of succession to strīdhana none of the commentators of the Mitākṣarā School except Durgayyā appears to have condescended to consider the position of an adopted son.⁽⁵⁾ Therefore so far as the law of the Mitākṣarā School is concerned the adopted son could come in as an heir only after the husband, if at all.

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- (1) The expression has been comprehensively used here to include the twelve kinds of sons mentioned by Manu etc., the secondary sons of a woman mentioned by Brihaspati and step-son as well.
- (2) The only probable exception is that of Varadarāja and Durgayyā, see infra.
- (3) This is quite in consonance with the etymological meaning of the word 'prajā' which can denote only natural children. As against this see the useful but fanciful etymological explanation of the word 'putra' which carries a spiritual tint : "Punnāmno narakātrāyata iti..." - See Vis.Smr.15.43; Manu IX.138; the Rāmāyana II.107.12; Brihaspati quoted in Vi.Ra.584.
- (4) Manu 9.192. 'Sodara' is intentionally used by other authors also to denote heirs by blood-relationship - Gau.Su.28.26, Baudhāyana quoted in Mit.on Yaj.2.146, Śaṅkha quoted by Haradatta on Gau.Su.28.22, Viṣṇu quoted in Sa.Vi.384.
- (5) But see Durgayyā infra.

Varadarāja is not helpful in ascertaining the general line of succession as he quotes all the diverse texts without developing any apparent systematic connection amongst them.⁽¹⁾ But his explanation of Bṛihaspati's text about ultimate heirs cites several opinions which show the diverse attempts made by several authors to incorporate in some way or the other the provisions of Bṛihaspati's text into the Mitākṣarā order. Varadarāja himself says that these heirs do not succeed so long as a sapinḍa up to the fourth degree exists.⁽²⁾ By implication he means to suggest that they succeed in the order of enumeration after the sapinḍas of the husband or father. On the other hand, he expresses an opinion of 'others' that the husband's younger brother, husband's brother's son and the husband's sister's son should succeed after the husband in cases wherein the succession would devolve upon the husband or his heirs and that the woman's own sister's son, her brother's son and her son-in-law should succeed after the father in cases wherein the succession would devolve upon him or his heirs; these are to succeed not in the order of enumeration in the text but in the order mentioned above which depends upon their relative superiority in the form of proximity (pratyāsattya-tiśaya) to the proposita.⁽³⁾

(1) See Vya.Ni.462-468.

(2) Vya.Ni.472. This means that an adopted son as well as a step-son and many other heirs succeed before the secondary sons. By implication, of course, the word 'sapinḍa' denotes sapinḍas of the husband in approved forms and of the father in unapproved forms. But then in the latter case the husband's younger brother etc. would succeed before the husband himself. Were it not for the doctrine of spiritual efficacy this is most unreasonable; but Varadarāja does not adopt that doctrine as his guiding principle in determining succession to strīdhana.

(3) Vya.Ni.472.

The second interpretation appears to be the most attractive attempt to solve the problem. Unfortunately it is supported by none else except Durgayyā.⁽¹⁾ In the Southern School itself Devaṇṇa, Mādhava and Pratāpa Rudra hold that these peculiar heirs succeed in the order of enumeration.⁽²⁾ The authors of the Benares and the Bombay Schools hold likewise. Therefore the explanation given by the majority of the influential authors must be held, from a practical standpoint, to be more acceptable than an intelligent explanation given by a non-influential minority.

Another bright suggestion made by Varadarāja is that the word 'svasrīyādyāḥ' occurring in Bṛihaspati's text should denote both male and female heirs like the sister's son and daughter etc. though Varadarāja is by no means solitary in making suggestions to include 'extra' female heirs.⁽³⁾ He mentions, however, the opinion of 'others' who depend on the Vedic declaration of women being

(1) See infra.

(2) Smr.Cha.666, Pa.Ma.374, Sa.Vi.386; Vi.Mi. & Vi.Ta. supra.

(3) Vya.Ni.472 : "Svasrīyādyā ityapatyamātrapratyayena apatyamātrapratīteḥ strīṇāṃ puruṣāṇāṃ cha dāyasambandho yukta iti (kechit)." The word 'kechit' occurs in some of the mss. of Vya.Ni. But it is definitely not the opinion of others but of Varadarāja himself as the text : "Women, being devoid of organs, are incapable of having any inheritance" which some others cite against the above opinion (see infra) has been rendered utterly harmless by Varadarāja by interpreting the word 'indrya' as 'soma' (see supra). So this progressive opinion is of the author himself; otherwise, both the views would be of some persons other than the author himself. In later times there appears to have been a tendency to include more female heirs. The tendency is definitely more common in the South. See Da.Slo.43a wherein the Pūrvapakṣin suggests that in succession to śulka the word 'sodaryāṇāṃ' should include both uterine sisters and brothers - an objection which is very meekly met with in the same way in which Varadarāja's opinion has been countered by his opponents (see below).

incapable of inheritance and conclude that only males could be included as heirs.⁽¹⁾

Incidentally the commentary of Durgayyā on this text may be considered from another point of view. It probably is the most extensive and the logical amongst the available commentaries on the texts of Bṛihaspati; Durgayyā discusses the implications of the texts in a typically Mīmāṃsaka way of giving both the prima facie and conclusive views.⁽²⁾ The commentary is on the eighth verse of the Dāyadaśaślokī which makes it amply clear that these two sets of heirs mentioned in the intelligent explanation given above succeed according to that order after the husband or father. Durgayyā interprets this verse in conformity with Bṛihaspati's text. But the Pūravapakṣin, referring to this latter text, says that notwithstanding this text the general rule of Āpastamba⁽³⁾ in connexion with succession to males viz. in the absence of son the next nearest sapinda should succeed should be made applicable to strīdhana succession as well; for in the first place, he points out that the daughter, husband or father are not mentioned in Bṛihaspati's text at all so that if the order given in the text is followed⁽⁴⁾ the sister's son etc. would succeed directly in default of the son and

(1) Vya.Ni.463 : "Anye tu strīpumsasādhāraṇātideśe pi pumsyeṇa prathamam pratītyudayāt tasmāt striyo nirindriyā iti arthavād-adarśanāchcha puruṣaṇāmeva dāysambandho na strīṇām iti manyante."

(2) The standard definition of an adhikarāṇa is:-
Viśayo viśayaśchaiva pūrvapakṣastathottarah/
Nirṇayaścheti pañchāṅgam śāstre'dhikarāṇam smṛitam//.

(3) Apa.Dha.Su.2.14.2 : "Putrābhāve yaḥ pratyāsannaḥ sapindaḥ."

(4) 'Yathāśruthārthagrahaṇa' - see infra.

daughter's son and that such an arrangement would contradict the provisions of Gautama and Yājñavalkya in the daughter's favour;⁽¹⁾ secondly, he says that the adopted son etc. would not be comprehended by the word 'aurasa' which occurs in the text. So to avoid the logical absurdity of following the order as mentioned in the text (yathāśruthārthagrahaṇasya anupapannatayā) the succession should devolve upon the next nearest sapinda⁽²⁾ (of the husband or the father as the case may be). So much for the imaginery Pūrvapakṣin's case.

Durgayyā replies that the rule given by Āpastamba as well as the one given by Manu applies only to a male's property and has no connection whatsoever with strīdhana, since the daughter succeeds to the latter despite the existence of an aurasa son himself. As for the second argument of the Pūrvapakṣin, he says that the word 'aurasa' in Bṛihaspati's verse should be taken as denoting the importance of the aurasa son in the first instance but also as including other sons as well.⁽³⁾ Apparently, therefore, he seems to understand the adopted son as comprehended within the word aurasa.⁽⁴⁾

Durgayyā adds that these secondary sons viz. Sister's sons etc. have

(1) Gau.Su.28.22, Yaj.2.117 etc.

(2) For the whole prima facie view see Da.Slo.f.40a-41a.

(3) Aurasa, he says, is for 'prādhānyakhyāpanārtha'.

(4) It may be stated here that, according to the Mitākṣarā sub-schools, at least for the purpose of succession, a woman's step-son cannot be included in this list of 'gaunaputras' who are usually referred to by the earlier author as 'kṣetrajādi' and by the later as 'dattakādi'; for a man's brother's son, although declared by Manu and others to be equal to a son, does not succeed to his uncle's property as a son. The provisions by which a step-son and a brother's son are declared to be equal to a son of a woman and a man respectively are very similar. See infra.

been specifically mentioned as heirs in succession to strīdhana, and that therefore it is better to determine the order of succession amongst them only by examining their relative proximity rather than to choose the next heir from the sapinḍas by depending upon the principle given by Manu and Āpastamba.⁽¹⁾

All this discussion shows that there was a trend amongst some of the authors to create for a female a cadre of secondary sons similar to those created for a male. But whereas secondary sons of a male owed their existence to the doctrine of spiritual benefit⁽²⁾ secondary sons of a female could claim a special right merely on account of their proximity to the proposita. On account of lack of unanimity amongst the different authors, however, Bṛihaspati's text has practically to be discarded in determining the order of succession according to the Southern School or any other Mitākṣarā sub-school. The valuable suggestion of Durgayyā, therefore, cannot be adopted in practice. His suggestion, however, ^{to} admit the adopted son within the word 'aurasa'⁽³⁾ is helpful in placing him before the step-children though after the husband.

Mādhava and Pratāpa Rudra on the whole follow the

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- (1) "Ata strīdhanaviṣaye evāhatya yeṣāṃ dhanaprāptiruktā teṣāmeva sannipāte pratyāsattivaśena paurvāparyakalpanā nyāyyā." Da. Slo.41a. See also 42a. The words 'teṣāmeva' are not intended to exclude the secondary sons 'dattakādi' but to ward off the suggestion of the Pūrvapakṣin that after the husband etc. the nearest sapinḍa should succeed. See also Jīmūta repudiating the same suggestion, infra. For complete arguments of Durgayyā against the prima facie view see Da.Slo.f.41a-42a.
- (2) See Manu IX.180 etc.
- (3) For an exactly similar suggestion see Raghunandana and Śrīkṛiṣṇa infra.

Mitākṣarā provisions⁽¹⁾ though the latter notes that the opinion of Vijñaneśvara is contradictory to that of Someśvara, Aparārka and Bhāruchi.⁽²⁾ Durgayyā gives a system of succession which largely resembles the order given in the Mayūkha or the Smṛitichandrikā. He prescribes the Mitākṣarā order of succession for yautaka which, according to him means property obtained from the parents' family;⁽³⁾ but he gives a joint right of succession to sons and unmarried daughters in strīdhana obtained from the husband's family. He divides strīdhana into these two categories only⁽⁴⁾ and gives these two lines of succession. Like Devaṇṇa he confirms that even in a case where a woman is married in an unapproved form, only that property which was obtained from the parents' family goes to them; in the cases of approved forms the husband takes all strīdhana irrespective of the source from which it came.⁽⁵⁾ Like Nīlakaṇṭha he regards self-acquired property as not strīdhana⁽⁶⁾ and states that sons alone succeed to that property.⁽⁷⁾ The similarity between the words of the provisions of Durgayyā and Nīlakaṇṭha tends to fortify our

(1) Pa.Ma.370-74, Sa.Vi.383-86.

(2) Sa.Vi.383.

(3) Da.Slo.f.39a : "Evambhūtaṃ pitṛikulaprāptaṃ strīdhanam saudāyikaśabdena yautakaśabdena chochyate." See also 38b. The same interpretation is given by some of the authors of the Mithila School and by Mādhava - Pa.Ma.372. See also supra.

(4) An inclination to divide strīdhana into categories viz. that obtained from the father's family and that obtained from the husband's family, is clearly seen amongst the Southern authors. They prescribe the Mitākṣarā succession for the first category and give a joint succession to sons and daughters in the latter. See Vya.Ni.463; Pa.Ma.372; Da.Slo.37a-39b. In Pa.Ma. such arrangement is introduced as an alternative interpretation.

(5) Da.Slo.38a & b.

(6) Da.Slo.38a-38b.

(7) Da.Slo.f.39b : "Mātuh śilpaprāptaṃ dhanam putrā eva gṛihṇīyuh." For similar wording of the Bengali authors see supra. P.355.

previous conclusion that according to the Mayūkha such property has the same succession as the one prescribed for male's property, since it is possible that Durgayyā had Nīlakaṇṭha before him and understood him in this sense.

After having referred to all these authors and their diverse opinions one cannot exactly establish the śāstric law of what is known as the Southern School. In the absence of a consensus of opinion among them one cannot but turn to the celebrated commentary of Vijñāneśvara in order to ascertain, for practical purposes, the law of the 'Southern School'.

By contrast the authors of the Bengal School are outstanding in giving a detailed line of succession and in substantiating the details with the help of Mīmāṃsā and the doctrine of spiritual efficacy. But for any textual authority to the contrary, Jīmūta depends entirely upon the doctrine of spiritual efficacy and his technique is carried to perfection by his followers who support or supplement his conclusions with the help of additional mīmāṃsaka arguments. Unfortunately Jīmūta himself is ambiguous at some places and such obscurity has caused confusion amongst his followers making the law of the Bengal School itself appear dubious at certain points.

Jīmūta mentions in the beginning the texts of Manu,⁽¹⁾ Brihaspati⁽²⁾ and Śaṅkha⁽³⁾ and concludes therefrom that the uterine

(1) Manu 9.192.

(2) 'Strīdhanam tadapatyānām etc.' supra. p. 330.

(3) 'Samam sarve sodaryah etc.' supra. pp. 318-19.

sons and maiden daughters succeed simultaneously and equally to their mother's strīdhana.⁽¹⁾ This provision apparently refers to all strīdhana excepting yautaka and pitridatta for which Jīmūta lays down different orders of succession.⁽²⁾ He explains that 'cha' in Manu's verse denotes 'itaretarayoga'⁽³⁾ and then comments that the same word 'cha' in all the above quotations denotes 'samuchchaya'.⁽⁴⁾ To satisfy a person who might object to such a comprehensive interpretation of 'cha'⁽⁵⁾ he quotes Devala who is more clear in giving simultaneous succession to uterine sons and daughters.⁽⁶⁾ The word 'apatya' in Brihaspati's text has been explained as 'putra' or son.⁽⁷⁾ Achyuta and Śrīkṛṣṇa explain : as persons of doubtful sex are excluded and as the maiden daughter is mentioned separately in the text the word 'apatya' can mean son only.⁽⁸⁾ Achyuta adds that on account of the word 'uterine' (sahodara) kṣetraja and other sons cannot share

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- (1) Da.Bha.4.2.1-5. See also Da.Ta.42; Da.Kra.Sam.24; in the latter treatise it is clearly mentioned that the order applies to ayautaka strīdhana.
- (2) See infra.
- (3) Da.Bha.4.2.2 : "Dvandvāśravane'pi tattulyārthakachakāreṇa..."
- (4) Bha.4.2.5 : "Chakāraśrutiśchā sarvatrānugatā samuchchayaavāchikā." But itaretarayoga and samuchchaya are not the same thing. See supra.p.342.
- (5) For instance a person might say that 'cha' in Gau.Su.28.22 should give a simultaneous succession to unaffianced and be-brothed daughters or that 'cha' in Yaj.2.135 should give a simultaneous succession to a widow and daughter as well - See Maheśvara and Śrīkṛṣṇa on Da.Bha.4.2.5.
- (6) Da.Bha.4.2.6 : "Sāmānyam putrakanyānām etc." supra.
- (7) Da. Bha.4.2.4.
- (8) The presumptuous way in which persons of doubtful sex (lit. impotent) are held to be excluded from strīdhana succession shows that persons who are disqualified from getting a share in joint family property or from inheriting male's property are also excluded from strīdhana succession according to the Bengal school.

equally with the daughter but get a one-fifth share as in the case of a male's property.⁽¹⁾ Śrīkṛiṣṇa refers to this as opinion of 'some people' and apparently suggests that a dattaka should share equally with the maiden daughter.⁽²⁾ The opinion of Achyuta gives a right of succession even to illegitimate children⁽³⁾ The rights of an adopted son and illegitimate children will be discussed later on at an appropriate stage. But since the textual authority is in favour of a uterine brother only the introduction of an adopted son

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- (1) Achyuta : "Atra sahodarapadādyupādānāt kṣetrajādīnām na duhit-
ṛisamāṁsitā kintu duhitrapekṣayā pañcamādyamśabhāgitāiva
pumḍhanavaditi bhāvyam." For the rights of Kṣetraja etc. in
competition with an aurasa son wherein the former get, accord-
ing to their caste, one-third, one-fifth, or one-sixth share
see Da.Bha.10.8-11.
- (2) He repeats the remark of Achyuta with slight modification :
"Atra sahodarapadādyupādānāt kanyāsattve dattakādīnām nādhik-
ārah duhitrapekṣayā pañcamādyamśabhāgitā pumḍhanavaditi
kechit." The full-stop which occurs after the word 'adhikārah'
in the Calcutta edition (1863) is wrong and confusing. The
full-stop (daṇḍa) does not occur in the Calcutta Devanāgarī
edition (1827 Education Press p.128). The latter edition also
is replete with misprints and arbitrarily gives a full-stop
after the word 'upādānāt' though this latter mistake is less
confusing. Actually Śrīkṛiṣṇa finds himself unable to agree
with Achyuta since in accordance with the later theory he feels
that an adopted son is equal to a natural-born son : he in-
cludes the former in the word 'aurasa' - see infra Da.Bha.
4.3.29-34. In this passage both Raghunandana and Śrīkṛiṣṇa
expressly admit the right of an adopted son to inherit his
adoptive mother's property. So it is impossible to maintain
that the latter wants, in the passage above-mentioned, to deny
the right of the adopted son - a suggestion which could be put
forth only with the aforesaid misprint in the Calcutta 1863
edition. In that he is really discussing a different point,
namely, whether an adopted son has a right to succeed simultane-
ously with a daughter to his adoptive mother's strīdhana, and
if so, what could be his share.
- (3) See the word 'kṣetrajādi' used by Achyuta as against the word
'dattakādi' used by Śrīkṛiṣṇa. Compare also Da.Bha.10.8 with
Da.Kra.Sam.52 (Setlur's translation 7.23; the translation, how-
ever, contains a mistake : read 'adopted son etc.' instead of
'adopted sons' as given in the translation).

must be regarded as an innovation by the later authors who probably based their view on custom and public opinion.

Jīmūta rejects the possibility that a maiden daughter should have a preferential right in all of her mother's strīdhana; he says Manu's special provision⁽¹⁾ in that case would be useless.⁽²⁾ On failure of both sons and maiden daughters the succession devolves upon married daughters who have male issue or are likely to have male issue,⁽³⁾ because they are capable, according to his peculiar theory, of conferring spiritual benefit through their sons. Jīmūta then confers the right of succession upon the son's son and the daughter's son successively; the former excludes the latter since the existence of a son excludes a married daughter and the above two heirs are sons of these two latter heirs.⁽⁴⁾

He then mentions that in default of all heirs up to the daughter's son barren and widowed daughters succeed because they constitute the progeny (prajā) of a woman and that other heirs like the husband etc. have a right to succeed only in default of the progeny of a woman.⁽⁵⁾ In short Jīmūta who has postponed the right

(1) Manu 9.131 supra.

(2) Da.Bha.4.2.7.

(3) Da.Bha.4.2.9; Da.Ta.42; Da.Kra.Sam.25. Śrīkṛiṣṇa explains that the expression 'married daughter' (ūḍhā) gives both affianced and married daughters a simultaneous right. So the expression 'maiden daughter' in Da.Bha.4.2.7 can include only unaffianced daughters.

(4) Da.Bha.4.2.10-11; Da.Ta.43; Da.Kra.Sam.25.

(5) Da.Bha.4.2.12 : "Uktānām tu sarveṣām dauhitraparyantānāmabhāve vandhyāvidhavyayorapi mātṛidhanādhikāritā tayorapi tatprajātvāt prajābhāve cha anyeṣām adhikārāt." See also Da.Ta.42 and Da.Kra.Sam.26 for similar reasoning though some additional heirs are admitted before these daughters.

of barren and widowed daughters by applying the test of spiritual efficacy has at last to admit them as heirs only because the texts are in their favour.⁽¹⁾ Most scholars and judges have formed a mistaken notion about this provision which, they vehemently maintain, shows that Jīmūta adds some heirs on the ground of natural affection and does ^{not} _A invariably follow the test of religious efficacy.⁽²⁾ Really speaking he admits them only because his hands are tied by the texts which he has followed, whereas he tries to damage the position of these daughters by admitting several other heirs before them on the ground of spiritual efficacy.

This is the progeny which Jīmūta has described and in default of which the succession, according to Devala's text, is to devolve upon the husband etc. But the commentators Śrīnātha, Rāmabhadra and Śrīkṛiṣṇa add that the word 'progeny' (prajā) includes son, daughter, step-son, son's son, daughter's son, son's grandson, step-son's son and step-son's grandson.⁽³⁾ This detailed enumeration has obviously been brought about with the help of the doctrine of spiritual efficacy. Jīmūta himself admits in a later passage the

(1) In the above passage he obviously refers to the text of Devala which appears in the immediately preceding context. See also Manu 9.196-97 and Yaj.2.143 supra.

(2) See for instance Banerjee p.476-77 which has been almost uniformly followed. See infra.

(3) Śrīkṛiṣṇa on Da.Bha.4.2.6 : "Apr^ajāyāmiti. Prajā santatiḥ. Putra-duhitṛi-sapatnīputra-pautradauhitra-prapautra-sapatnī-pautraprapautrarahitāyāmityarthah." Śrīnātha and Rāmabhadra make the same remark but for the fact that the commentary of the former reads 'dauhitrapautra' instead of 'pautradauhitra'. That appears to be a misprint. The enumeration may fairly be considered to be in order of succession though it is not expressly stated to be so. But as regards the step-son's location according to Śrīkṛiṣṇa see infra.

right of a step-son to succeed as a son of his step-mother.⁽¹⁾ The aforesaid detailed enumeration is quite remarkable since it mentions the step-son before the daughter's son - an opinion expressed by Jīmūta and rejected by almost all his followers including Śrīkṛiṣṇa himself. The point will be discussed later on. It may be mentioned here that both Raghunandana and Śrīkṛiṣṇa mention that a son's son's son succeeds in preference to barren and widowed daughters⁽²⁾ and Śrīkṛiṣṇa in his Dāyakramasaṅgraha puts the step-son, step-son's sons, and step-son's son's son before such daughters.⁽³⁾ The authors have consistently followed their master's principle in supplementing the line of succession given by him.

As regards the texts of Gautama, Manu, Yājñavalkya, Kātyāyana, Nārada, etc.⁽⁴⁾ which prefer the daughter as the first heir to strīdhana, Jīmūta explains that these texts apply to the devolution only of the yautaka strīdhana of a woman.⁽⁵⁾ From the etymological meaning of the root-verb 'yu' he interprets yautaka to mean property obtained by a woman during her nuptials.⁽⁶⁾ The verb

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- (1) Da.Bha.4.3.32-33. Para.No.33 has been doubted by some scholars and judges as being spurious. See infra.
- (2) Da.Ta.43, Da.Kra.Sam.25.
- (3) See his summary in his commentary on Da.Bha.4.3.40-42, Da.Kra.Sam.25-26, Śrīkṛiṣṇakānta Śarma in his commentary on Da.Bha.4.3.40-42 admits this order. He is the last commentator on the Dāyabhāga. But for other Bengali authors who have written independent treatises during the British era see infra.
- (4) Gau.su.28.22, Manu 9.131, Yaj.2.117, Kātyāyana: Māturdhit-aro'bhāve ...etc.
- (5) Da.Bha.4.2.13, Da.Kra.Sam.21, Da.Ta.43-44.
- (6) Da.Bha.4.2.14 : "Yū miśraṇa iti dhātoryuta iti padaṃ miśrat-āvachanam".

'yu' is actually used both in the sense of mixture and severence.⁽¹⁾ The older commentators like Medhātithi and others adopted the latter meaning and interpreted yautaka to mean a woman's separate property i.e. strīdhana.⁽²⁾ In one of the verses of Yājñavalkya - which incidentally appears to be the only reference in smārta literature to yautaka besides that made by Manu⁽³⁾ - the word appears to have been used with the same etymological sense viz. property which is kept separate.⁽⁴⁾ A slightly different meaning has been attributed to the same word by the very ancient author, Devasvami, who takes resort to the same meaning of the root, but says that yautaka means property obtained by a woman from her father's family and kept separate from property obtained by her from the husband's family.⁽⁵⁾ Some authors of the Mithila School as well as Mādhava and Durgayya appear to have followed the lead of this author.⁽⁶⁾ Jīmūta appears to be almost the first author to adopt the first meaning of the root and to interpret yautaka as nuptial property. For further elucidation

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- (1) Vi.Mi.548 : "Yautakaśabdasyāmiśraṇamapyarthah. Yumiśṭaṇāmiśraṇayoriti dhātupāṭhāt yutasiddhāviti prayogāchcha iti Devasvāmyāha." But see Nighaṇṭu quoted both in Smr.Cha.662 and Vi.Mi.548 which proves that the word yautaka was since then used to denote nuptial gifts. Another reading of yautaka is yautuka: see Amarakośa quoted in Vi.Mi.548.
- (2) See Medhātithi and Sarvajñanārāyaṇa on Manu 9.131. Apparently Vijñāneśvara also must have understood the word in the same way.
- (3) Manu 9.131.
- (4) Yaj.2.149. Mit.: "...yautakaiḥ prithakkritaiḥ ..."
- (5) Devasvāmi quoted and repudiated in Smr.Cha.662 and Vi.Mi.548. The work of this author does not appear to be available. The girl who brought property from her father's family must have been unwilling to mingle it either with her husband's joint family property or with the property given by him - in the former case she would have lost all her right to the property, in the latter she minimised her moral right to prevent her husband from misapplying her property.
- (6) See supra p.360, Pa.Ma.372, Da.Da.Slo f.39a, see also Haradatta on Gau.su.28.22.

tion he also quotes the mantras which are chanted at the time of the marriage ceremony for the purpose of bringing about the physical union of the bride and bridegroom.⁽¹⁾ It is remarkable to note that almost all the authors of the Bengal as well as of the other schools with the exceptions noted above have followed the lead of Jīmūta in interpreting yautaka as nuptial property. It may be noted that in this latter sense it represents only that category of strīdhana which is known as adhyagni although it includes in fact property given at any time during the nuptial ceremony.⁽²⁾

Jīmūta includes the text of Vasiṣṭha in the same group by preferring the reading pāriṇāyya instead of pāriṇāhya.⁽³⁾ During the same discussion he refers to Manu's provision⁽⁴⁾ about a brāhmin daughter and says that the property given by the father, even if it is not given at the nuptials, devolves upon the daughter alone and that the word 'brāhmaṇī' is a mere 'anuvāda'. Alternatively he suggests that lest the term 'brāhmaṇī' be rendered meaningless it may be held that the brahmin step-daughter should inherit the property of the kṣatriya and other step-mothers who have died childless and that the succession should not directly devolve upon the husband

(1) See Da.Bha.4.2.14, Da.Ta.44, Vi.Mi.548.

(2) While explaining yautaka Raghunandana in his Dāyatattva says: "Pariṇayanakālaḥ pariṇayanapūrvāparībhūtakālaḥ sa cha vṛddhiśrāddhārambhapatyabhivādanānto Vivāhatattve vivṛitaḥ/ - Da.Ta.44

(3) Da.Bha.4.2.15. But see Bālabhaṭṭa on Mit.on Yaj.2.145 who argues that such reading is ungrammatical and quotes Pāṇini su.3.1.127-29.

(4) Manu 9.198.

etc. (1) From the context of the passage it is obvious that he wants to prescribe the same order of succession for such property as for yautaka. But the alternative interpretation as well as the reasoning given for this second alternative make the passage highly enigmatical. The word 'anuvāda' has been translated by some as 'illustrative'. (2) It actually means an arthavāda (an explanatory statement) which is a bare statement of fact that can be an object of direct perception. (3) Hence in the Śāstra it may denote something which is superfluous or useless. (4)

The provisions contained in the Dāyabhāga are simply repeated in the Dāyatattva (5) and it is not easy to determine whether these provisions refer to all the property given by the father viz. to property whether given before the marriage, at the time of

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- (1) Da.Bha.4.2.16. The whole ^{passage}, which has given rise to lengthy discussions amongst the commentators on Jīmūta is as follows:-
 "Atra pitrā dattamiti viśeṣaṇāt vivāhasamayādanyatrāpi yat pitṛidattam tat kanyāyā evetyatadartham, brāhmaṇīpadamñchānuvādaḥ. Yadvā brāhmaṇīpadasyānārtahyabhayāt kṣatriyādistṛiṇāmanapatyānām pitṛidattam dhanam sapatnīduhitā brāhmaṇī kanyā haret na punaraprajāstrīdhanam bharturiti vachanasāvākāśa iti vachanārtah.
- (2) See Setlur's translation of Da.Bha.4.2.16 wherein the word 'illustrative' has been explained in the brackets as 'indicating that a daughter of the same caste with the giver inherits' See also Da.Kra.Sam.(text p.27) translation 2.5.5. Banerjee (p.483) adopts the above translation.
- (3) The arthavādas are of three kinds: "Virodhe guṇavādassyāt anuvādo'vadhārite/ Bhūtārthavādastaddhānātarthavādastridhā mataḥ//". The three kinds are illustrated by the following instances: "Agnirhimasya bheṣajam"; "Ādityo yūpaḥ"; "Vajrah-astah Purandarah" respectively. The first one is pramāṇāntar-agochara, the second is pramāṇāntaraviruddha and the third is pramāṇāntarātīta.
- (4) For the utility of arthavāda from the śāstric point of view see Jai.su.supra. See Golapchandra Sarkar: Hindu Law sixth edition p.20 where the word anuvāda has been taken to mean superfluous.
- (5) Da.Ta.44-45

marriage or after the marriage. In the Dāyakramasaṅgraha Śrīkṛiṣṇa gives the order as maiden daughter, married daughter who has or is likely to have male issue and then remarks that in default of all the daughters the sons etc. succeed in the same order as to yautaka. He also definitely states that this order applies to pitṛidatta whether it is yautaka or ayautaka.⁽¹⁾ In their commentaries on the Dāyabhāga, however, Śrīkṛiṣṇa apparently, and Śrīkṛiṣṇakānta definitely, maintain that such special order of succession is applicable to pitṛidatta excluding property obtained at the time of marriage.⁽²⁾ Actually it appears that Jīmūta as properly understood by Śrīnātha⁽³⁾ did not want to create a special order of succession for pitṛidatta but simply wanted to give to the same a line of succession similar to that prescribed for yautaka.

But the initial passage in the Dāyabhāga itself being ambiguous it is no wonder that the commentators on Jīmūta are also not very clear on this point although they lavishly draw upon their knowledge of the Mīmāṃsā to interpret this passage. Śrīnātha and Rāmabhadra explain that only a brahmin step-daughter is entitled to inherit the property of her step-mothers of lower caste as she alone is capable of conferring spiritual benefit through her sons. Maheśvara interprets the word 'anuvāda' to mean that in cases of all mothers of all castes their own daughters of the same caste have a

(1) Da.Kra.Sam.26.

(2) See their commentaries on Da.Bha.4.3.40-42 wherein they summarise the different lines of succession. But see Śrīkṛiṣṇa on Da.Bha.4.2.16 where he says that a 'kanyā' succeeds to pitṛidatta whether it is yautaka or ayautaka. He is thus self-contradictory.

(3) Śrīnātha : "Etena idamapi yautakatulyamityuktamiti". For other authors see infra.

preferential right to succeed to their mother's pitridatta strīd-hana. (1) In short he appears to carve out all pitridatta from the non-yautaka property so as to prescribe for it an order of succession similar to that of yautaka. The same appears to be the interpretation of Śrīkṛṣṇa and probably of Achyuta. Raghunandana is as ambiguous as his master. But Śrīkṛṣṇakānta appears to adopt the Mitākṣarā explanation of Manu's provision. Anyhow the commentators seem to be unanimous in holding that in succession to pitridatta a daughter should be preferred to a son. (2) Both Śrīkṛṣṇa and Śrīkṛṣṇakānta mention the order as follows:- Maiden daughter, son, daughter who has a male issue or is likely to have a male issue, daughter's son, son's son, son's son's son, step-son, step-son's son, step-son's son's son, and barren and widowed daughters. The order closely resembles the order prescribed for yautaka which, even if it is pitridatta, has a special order of succession according to these two authors. (3)

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- (1) This shows that Maheśvara paraphrases the first alternative given in the Dāyabhāga whereas Śrīnātha and Rāmabhadra paraphrase the second alternative. It is obvious that the opinion of Maheśvara has impressed the later commentators and also the translators. But it is forgotten by these people that the provision also refers to the right of the step-daughter. At other places not only Śrīnātha but other commentators also maintain that wherever the step-son comes in the step-daughter also comes in as being included in the word step-son. See *infra* Da.Bha.4.3.32-33.
- (2) The intricate discussions carried on by the commentators may be summarised as follows:- that the provision lays down that the daughter of a brahmin woman succeeds in preference to a son; but this should not be taken to form a 'parisaṅkhyā' to the effect that in the case of pitridatta of a woman who is kṣatriya etc. her son succeeds notwithstanding the existence of her daughter.
- (3) See their summaries given in their comments on Da.Bha.4.3.40-42.

In fact considering the original passage in the Dāyabhāga there does not appear to be any reason for pitṛidatta to have even a slightly different order than the one prescribed for yautaka.

To continue with the order of succession laid down for yautaka in the Dāyabhāga, in default of the daughters, the son succeeds and not the daughter's son; ⁽¹⁾ for Jīmūta interprets the word 'anvaya' occurring in Nārada's and Yājñavalkya's verses ⁽²⁾ as denoting the issue of the mother and not of the daughter. ⁽³⁾ He points out that the same word 'duhitṛi' cannot possess two meanings at the same time viz. 'issue' (janya) in relation to the mother and 'mother' (janakā) in relation to her own issue (anvaya). ⁽⁴⁾ What he means to say is that such an interpretation would involve the fault of attributing to the same word two functions or meanings viz. the 'abhidhā' (direct) and the 'lakṣaṇā' (secondary). ⁽⁵⁾ Secondly he points out that both the word 'duhitṛi' and 'anvaya' convey the meaning 'progeny' and so it is more reasonable to connect both of them to the word mother, which they are in need of (ākāṅkṣitatvāt lit. in expectancy of) for the purpose of completing their own sense. ⁽⁶⁾

(1) Da.Bha.4.2.21, Da.Ta.45, Da.Kra.Sam.22.

(2) Yaj.2.117, Na.Smr.16.2 supra.

(3) Da.Bha.4.2.17-18, Da.Kra.Sam.22.

(4) Da.Bha.4.2.19: "Na cha tadanvaya iti tachchhabdopāttāyā duhituranvayayogyatā vāchyā tachchhabdasyāpi prakṛitavāchitayā duhitṛirūpeṇaivopapādakatvāt."

(5) Śrīkṛiṣṇa commenting on the above passage pedantically remarks: "Tathā cha māturanvayārthaṃ mukhyasya duhitṛipadasya anvayapadārthānvayārthaṃ na punarlakṣaṇā yugapadvṛittidvayavirodhāditi bhāvaḥ." For the two functions and meanings of a word see supra p. 250. But see Vi.Mi.551 wherein this reasoning has been ridiculed excellently.

(6) Da.Bha.17-18.

Moreover he says that the word 'duhitṛi' in Yājñavalkya's verse stands in the nominative case and the pronoun 'tad' in the ablative case; so the pronoun 'tad' cannot be taken to be referring to the word 'duhitṛi' so as to put the latter word in a genitive case for the purpose of extracting from the same the meaning 'daughter's issue'.⁽¹⁾

Probably suspecting that all the above arguments could be met with counter-arguments⁽²⁾ he quotes a text of Baudhāyana to the effect that if the heirs of one's own body exist property devolves upon them and finally relies upon this quotation to prefer a son to a daughter's son.⁽³⁾

It need not be added that all the above arguments have been countered by Jīmūta's opponents like Mitra Miśra and Bālabhātta with equally forceful mīmāṃsaka arguments. It must be borne in mind that on account of Jīmūta's doctrine of spiritual efficacy a son is the most important heir in his eyes whether in succession to a male's property or a female's property;⁽⁴⁾ so under the apparently brilliant Mīmāṃsaka discussion lies the undercurrent of this doctrine which pervades the Dāyabhāga.

For determining the order of succession to yautaka amongst the daughters inter se Jīmūta depends upon the sūtra of Gautama which

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- (1) Da.Bha.4.2.20. To understand this argument compare the two parts of Yaj.2.117 viz. 'Maturduhitarah' and 'tābhya rite anvayah'.
- (2) See Śrīkṛṣṇa on Da.Bha.4.2.21. For counter-arguments see Vi. Mi.551, Bal on Mit.on Yaj.2.145 etc.
- (3) Da.Bha.4.2.21, Da.Kra.Sam.22.
- (4) See Da.Bha.4.1.5.

he interprets as prescribing the order: unbetrothed daughter, betrothed daughter and married daughter.⁽¹⁾ He includes married daughter in the order because, in his opinion, the sūtra makes such strīdhana devolve upon daughters generally and the word unbetrothed etc. (aprattādi) are used simply to denote the order of precedence.⁽²⁾ Such an interpretation, of course, cannot be had without doing violence to the language of the sūtra and to the probable intention of its author.⁽³⁾ To ratify his position he further suggests that the word 'aprattā' in Bṛihaspati's verse suggests that the married daughter has also the right to succeed in the absence of an unbetrothed daughter etc. This justification is also highly objectionable since, in the first place, the reading of the verse which has been accepted in the Dāyabhāga⁽⁴⁾ clearly suggests that the married daughter had no right to succeed at all, and in the second place, Jīmūta has already utilised the text of Bṛihaspati in laying down the order of succession for ayautaka strīdhana, as a result of which the text cannot be transplanted from its fixed position in the ayautaka order to the yautaka order so as to incur the fault of attributing a double meaning to a smṛiti text. Śrīkṛiṣṇa states that a married daughter is included by the word 'cha' in the sūtra

(1) Da.Bha.4.2.23 and 25, Da.Ta.43-44, Da.Kra.Sam.21.

(2) Da.Bha.4.2.23, Da.Ta.44, Da.Kra.Sam.21.

(3) For the word 'duhitṛīṇām' is definitely qualified by the adjectives 'aprattā etc.' so that there is no general provision in favour of all daughters.

(4) See Bṛihaspati quoted in Da.Bha.4.2.3. The reading which is accepted is 'samūḍhā tu na labhenmātrikaṃ dhanam' instead of 'labhate mānamātrikaṃ' as accepted in many other treatises. See supra.

itself.⁽¹⁾ This raises an important question, namely, why the word 'cha' in this sūtra should not denote 'itaretarayoga' so as to give a simultaneous succession to all the daughters? Achyuta and Śrīkṛiṣṇa repudiate such a conclusion by stating that according to Manu yautaka devolves upon the unmarried daughters alone.⁽²⁾ The former states that the unbetrothed daughter is preferred to a married daughter because she belongs to the gotra of the mother. Śrīkṛiṣṇa gives the same reason in preferring a betrothed daughter to a married daughter.⁽³⁾

It is evident that Jīmūta interprets the word 'apraṭiṣṭhitā' to mean betrothed daughter although he does not expressly state so.⁽⁴⁾ But none of the commentators on the Dāyabhāga tries to explain how such an interpretation can be arrived at. In the Dāyatattva the author explains that the negative prefix in the word denotes that the daughter has been slightly praṭiṣṭhitā.⁽⁵⁾ The enigma is solved when Achyuta tells us that a praṭiṣṭhitā daughter is one who has male issue or is likely to have male issue.⁽⁶⁾

In the Dāyabhāga itself there is no mention of the right of widowed or barren daughters. Jīmūta simply states that in default of

(1) Śrīkṛiṣṇa on Da.Bha.4.2.23, Da.Ta.44.

(2) This is interpreted by Maskari and Devaṇṇa as giving a simultaneous right to both kinds of daughters. But see Achyuta and Śrīkṛiṣṇa on Da.Bha.4.2.21-26. For itaretarayoga see supra.p.342.

(3) Commentaries on Da.Bha.4.2.21-26.

(4) Da.Ta.44, Da.Kra.Sam.21.

(5) Da.Ta.44 : "...īṣadathe nañ ..."

(6) Achyuta on Da.Bha.4.2.21-26.: "...putravatīsamhāvitaputrayoḥ praṭiṣṭhitayoh..." The Calcutta edition, however incorrectly reads 'praṭiṣṭhitāyāḥ'. This shows that the meaning of the word 'praṭiṣṭhitā' is the same according to almost all commentators; but on account of differences in understanding the negative prefix 'nañ' the meaning of the word 'apraṭiṣṭhitā' is not the same according to the Mitākṣarā and Bengal Schools.

all the daughters the son succeeds. Śrīnātha, however, includes both of them in the word 'married daughter' (pariṇītā) as found in the Dāyabhāga. Both Achyuta and Śrīkṛiṣṇa state that amongst the married daughters one who has male issue or is likely to have male issue succeeds in preference to the others. This is another instance of the Dāyabhāga being supplemented by the commentators with the help of an application of the doctrine of spiritual efficacy.⁽¹⁾

For succession amongst the progeny themselves Jīmūta does not give any more details. The commentators Śrīkṛiṣṇa and Śrīkṛiṣṇakānta give the detailed line as follows:- Unbetrothed daughter, betrothed daughter, daughter who is having a male issue and/or daughter who is likely to have male issue, barren and/or widowed daughter, son, daughter's son, son's son, son's son's son, step-son, step-son's son, and step-son's son's son.⁽²⁾ Incidentally, following the theory 'inherited property is not strīdhana' Śrīkṛiṣṇa makes a remark that if a maiden or betrothed daughter having succeeded to her mother's strīdhana dies as a barren daughter or a widow the succession would devolve not upon her husband etc. but upon the daughter of her mother who has a male issue or is likely to have a male issue, or in her default upon a barren or widowed daughter of her mother.⁽³⁾ The provision has obviously been added just to emphasise the principle that inherited property is not strīdhana; it has no connection with the doctrine of spiritual efficacy as the

(1) See commentaries on Da.Bha.4.2.21-26.

(2) Commentaries on Da.Bha.4.3.30-42.

(5) Da.Kra.Sam.21.

husband of a deceased barren daughter is in a better position to confer spiritual benefit on his mother-in-law than her widowed daughter.⁽¹⁾

As regards succession to the property of a childless woman Jīmūta correlates the relevant verses of Manu and Yājñavalkya and interprets them to mean that the property which a woman secures during one of the approved forms of marriages devolves upon her husband in default of her own children.⁽²⁾ and the property which she obtained during one of the unapproved forms of marriage devolves, in default of her children, upon her parents.⁽³⁾ In short he rejects the opinion of the Mitākṣarā School and holds that these provisions refer only to the yautaka property which is received by a woman during the continuance of the marriage ceremony and not to all her property. In order to reject the more natural interpretation that these provisions refer to all the property of a woman married in a particular form of marriage he adduces the following reasons.

(a) He points out that the words occurring in the second verse of Manu, namely, 'property which is given to her in the forms

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- (1) In fact a barren or widowed daughter cannot confer any benefit on the proposita whereas a son-in-law offers pinḍas to his parents-in-law. - See Da.Bha.4.3.37.
- (2) Da.Bha.4.3.3, Da.Ta.45, Da.Kra.Sam.23. See supra for Manu 9.196 and Yaj.2.145. The way in which Jīmūta solves the compound 'brāhmādi' found in Yājñavalkya's verse evidently shows that he treats it as an 'atatguṇasaṃvijñānabahuvrīhi' so as to include all the four forms besides brāhma itself. See Rāmabhadra and Achyuta. This is really an intelligent attempt to correlate both the above verses when there is an apparent contradiction between them as to the exact number of approved forms. Śrīnātha, however, says that it is 'tadguṇasaṃvijñānabhuvrīhi'. Probably this is a misprint.
- (3) Da.Bha.4.3.6, Da.Ta.44, Da.Kra.Sam.24.

like Āsura etc.' expressly denote that, these provisions being inter-connected, 'property' refers only to nuptial property. This is a very sound point indeed. (1)

(b) Secondly he argues that if the word 'brāhma' etc. in the above verse, were to be connected with the word 'woman' they ought to have been mentioned in singular number and genitive case; for the word woman (which under the above hypothesis would have been qualified by the word brāhma etc. as adjectives) occurs in the singular number and genitive case. (2)

(c) Moreover in connecting the word brāhma etc. to the word 'property' a lakṣaṇā has to be resorted to i.e. these words are to be taken to represent the time of such marriage which is co-existent with the marriage itself; but in connecting these words to the

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- (1) Da.Bha.4.2.27. The second line of Manu 9.197 is : "Yastvasyāḥ syāddhanam dattam vivāheṣu āsurādiṣu". Jīmūta connects verse No.197 with 196 so as to carry over the word 'dattam' to verse No.196 as well.
- (2) Da.Bha.4.3.4. : "Brāhmādiṣviti kālārthatvāt nirdeśasya brāhmā dipadānām strīparatve ekatvena ṣaṣṭhyā cha nirdeśaḥ syāt." For the word 'asyāḥ' is genitive singular of 'asau' - a pronoun used for woman. For a reader who is not well conversant with the rules of Sanskrit grammar the remark as well as the discussion made by the commentators is very difficult to understand. According to Pāṇini words denoting action, if used in the locative case, really mean to show the time during which such action takes place. The standard illustration is "Goṣu duhyamānāsu gataḥ, dugdheṣu āgataḥ" which all the commentators refer to. What Jīmūta means is that the word brāhma etc., being used in the locative case, denote the time during which property is given to a woman. In any case he has to admit that they are used in a secondary sense. For details see Pa.Su.2.3.37 and the relevant comments in the Mahābhāṣya and the Siddhāntakaumudī.

word 'woman' a longer lakṣaṇā, namely, that these words denote a (continued) connection of the woman with the ceremony of the marriage which has already become a thing of the past, has to be adopted.⁽¹⁾ So, he suggests, that the latter has to be sacrificed in favour of the former which is a shorter one.

Jīmūta's interpretation is plainly arbitrary; for if the two verses of Manu⁽²⁾ are utilised only in laying down the order of succession to yautaka then there would be no verse in the Manusmṛiti which would apply to the ayautaka property of a childless woman. Secondly the inadequateness of his interpretation is quite apparent from the fact that some of the followers of Jīmūta apply the same provisions to ayautaka of childless women.⁽³⁾

As regards property which a woman receives during her marriage celebrated in one of the unapproved forms Jīmūta says that the mother succeeds first and then the father. In determining this relative priority he derives support from the analogical order of succession prescribed for the strīdhana of a maiden viz. the uterine brother, mother and father.⁽⁴⁾ This is another instance wherein Jīmūta clumsily tries to intermix two independent texts which even according to himself apply to two different kinds of strīdhana.⁽⁵⁾

(1) Da.Bha.4.3.4.: "Vivāhakāle lakṣaṇāyāñcha vartamānasambandhena lakṣaṇā syāt strīparatve cha atikrāntavivāhasambandhena lakṣaṇā jaghanyā, sā cha ayuktā." Śrīkṛiṣṇa explains: "Vivā hād-hikarāṇakālatvāpekṣayā tajjanyasamṣkāravattvasya gurutvāditi bhāvaḥ." For jaghanya see supra p.9.

(2) i.e. Manu 9.196-97.

(3) See infra.

(4) Da.Bha.4.3.6-7, for the text of Baudhāyana see supra.

(5) For admittedly he applies Baudhāyana's text to a maiden's property. See also supra for Brīhaspati's text which he applies to yautaka after having already utilised it for ayautaka. The same provisions cannot be applied to two different things. See Kumāṛila: "Sakṛiduchcharitaḥ śabdah sakṛidevārthaṁ gamayati." supra pp. 9, 250, 387.

He himself appears to be conscious of his clumsiness for he hastens to explain that, by the analogy of succession to a maiden's property, the uterine brother is not to be given the first place in succession to yautaka obtained during unapproved forms of marriage; for he is not mentioned in the text pertaining to the latter.⁽¹⁾

Jīmūta does not mention the detailed order of succession in the case of yautaka received in these two different kinds of marriages. But the commentators 'Śrīkṛiṣṇa and Śrīkṛiṣṇakānta mention the detailed order as follows:-⁽²⁾

(a) For strīdhana received during marriage celebrated in one of the approved forms the heirs in order of preference are the husband, brother, mother, and father.

(b) For strīdhana received during marriage celebrated in one of the unapproved forms the heirs in order of preference are the mother, father, brother, and the husband. In the Dāyatattva⁽³⁾

Raghunandana simply confirms the order given in the Dāyabhāga but in the Dāyakramasaṅgraha⁽⁴⁾ Śrīkṛiṣṇa confirms the order given by him in his commentary on the Dāyabhāga. The order which he has laid down is very sensible indeed for even in an approved form of marriage,

(1) Da.Bha.4.3.9.

(2) See their commentaries on Da.Bha.4.3.40-42.

(3) Da.Ta.45.

(4) Da.Kra.Sam.23-24. It ought to be noted here that the texts of Vṛiddha Kātyāyana and Yājñavalkya (see *infra*) which Jīmūta utilises to lay down a separate order for bandhudatta, anvādheyaka etc. have been utilised by Śrīkṛiṣṇa only to prove a brother's right, in default of the husband, in yautaka obtained in one of the approved forms of marriage; for unlike Jīmūta, Śrīkṛiṣṇa believes that there is no separate order, apart from the one mentioned above, for bandhudatta etc. See *infra*.

though there is a complete fusion of the wife with her husband's family, she can hardly be said to have been totally cut off from the family of her birth; similarly even in unapproved forms of marriage although the wife does not completely merge into her husband's family it cannot be said that she does not become a sapinda of her husband.⁽¹⁾ So it is perfectly justifiable to say that in default of preferential heirs in one line the succession should devolve upon the heirs in the other line.

After mentioning the order of succession for yautaka Jīmūta turns to the order of succession to property received by a woman after marriage in which, according to him, the brother has the first preferential right. At the outset he refers to Yājñavalkya's text⁽²⁾ which lays down that bandhudatta, śulka and anvādheyaka of a woman devolve upon her bāndhavas. He then tries to elucidate the right of a brother in all these kinds of strīdhana by referring to different texts dealing with succession to these three categories.

The word 'bandhu' in the compound 'bahdhudatta' has been interpreted by him as denoting parents. To avoid an overlapping division with yautaka or anvādheyaka he defines bandhudatta as property given by parents to their daughter during her maidenhood. He interprets the word 'bāndhava' to mean a brother.⁽³⁾ To confirm specifically Yājñavalkya's general statement in relation to 'bandhu-

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- (1) Chandavarkar J. vigorously maintains this view which seems to have been accepted by all the modern scholars. See *infra*.
 (2) Yaj.2.144 referred to in Da.Bha.4.3.10. The whole discussion in the Dāyabhāga starts in this 10th para and concludes in the 29th para.
 (3) Da.Bha.4.3.11 & 15.

datta he refers to the text of Vṛiddha Kātyāyana⁽¹⁾ which says that immoveable property which is given to a woman by her parents devolves, in default of her children, upon her brother. He maintains that the same rule is a fortiori⁽²⁾ applicable to moveable property which is given to a woman by her parents.

As regards śulka he refers to the famous text of Gautama⁽³⁾ and lays down the order as uterine brother, mother, and husband. The husband has been included on the authority of Kātyāyana's text which declares that bandhudatta devolves, in default of the bandhus themselves, upon the husband. Here again Jīmūta exposes himself; for according to his own definition of bandhudatta it cannot possibly include śulka.⁽⁴⁾ The unsatisfactoriness of his system becomes evident when we perceive that Jīmūta can somehow or other quote verses for a brother's preferential right in succession to bandhudatta and śulka but he fails to quote a single independent verse in

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- (1) Da.Bha.4.3.13-14. On the authority of Viśvarūpa he says that this rule is applicable to the property of a woman married in any one of the eight forms.
- (2) Daṇḍāpūpanyāyāt - Da.Bha.4.3.14. Śrīkṛṣṇakānta explains this nyāya : "Tannyāyārthastu yathā mūṣikānām apūpavidhdandaḥbhakṣaṇam apūpalakṣaṇaniyatam.." - Tīkā on Da.Bha.4.3.29-34. See note to Setlur's translation of Da.Bha.III.2.15:- 'A person who carries away a staff necessarily carries away with it the loaf which is inseparably attached to the staff. The expression therefore means "necessarily" or "a fortiori". This expression is used in the same sense in other legal treatises.' See also notes to Da.Bha.IV iii.14, Da.Kra.Sam.III 16 in Setlur's translations.
- (3) Gau.Su.28.23 - Da.Bha.4.3.27-28. In para no.28 Jīmūta lays down the order for śulka and in no.29 repeats the same order adding only the husband on the authority of Kātyāyana. So this para appears to be a resumé whereby he makes this order applicable to all the categories mentioned in para no.10. See also para no.26: "..sarvatraiva bhrātradhikāro vākyāt viśeṣānavagamāt." Śrīnātha, Maheśvara and Śrīkṛṣṇa explain the underlined words as referring to the text of Yājñavalkya's mentioned in para no.10 above.
- (4) Da.Bha.4.3. 11 & 15 supra.

favour of his preferential right in anvādheyaka. According to him however, the order given applies to all the three categories mentioned in Yājñavalkya's verse which he mentions at the outset of all this discussion, and which he treats as the basis of his further elucidation.

The whole attempt of Jīmūta here is so unsatisfactory that even his own followers decline to follow this order for non-yautaka strīdhana. In dealing with succession to general strīdhana i.e. all excluding yautaka and pitṛidatta Raghunandana states that such strīdhana devolves, in the absence of the progeny of the woman, upon her husband.⁽¹⁾ Upon the authority of Vṛiddha Kātyāyana he asserts that property given to a woman by her parents devolves upon her brother. This is definitely a more reasonable provision; for there is no apparent reason why a brother should have a preferential right in all the post-nuptial strīdhana. In all probability the bulk of the latter might consist of gifts from the husband alone or from his family. Both Śrīkṛiṣṇa and Śrīkṛiṣṇskānta in their commentaries⁽²⁾ maintain that the order applicable to a childless woman's non-yautaka strīdhana (under which they seem to include all except yautaka and pitṛidatta of a woman) is the same which is applicable to her yautaka strīdhana. The same order, according to these two commentators, is applicable to the pitṛidatta of a childless woman. Śrīkṛiṣṇa makes his position amply clear in his Dāyakramasaṅgraha,⁽³⁾

(1) Da.Ta.43.

(2) On Da.Bha.4.3. 40-42.

(3) Da.Kra.Sam.26. For his reason he quotes 'sāndṛiṣṭikanyāya'.

wherein, dealing with succession to ayautaka of a childless woman, he remarks: "On account of analogy from succession to yautaka the husband, brother, mother, and father succeed to the property of a woman married in one of the five forms viz. brāhma etc. and the brother, mother, father and the husband succeed in that order to the property of a woman married in one of the three forms i.e. the āsura etc.." In short he comes close to the Mitākṣarā position though by a roundabout way. The reason for the change brought about by the later authors of the Bengal School is obvious; they could easily see that even in an unapproved form of marriage like āsura etc. the wife became, for practical purposes, a member of the husband's family, and so probably thought it inequitable to continue to allow the brother to succeed, in preference to the husband, to all non-yautaka property of the proposita. There can be no doubt that this interpretation is truly representative of the law of the Bengal School, as it naturally reflects the change in public opinion without the authority and the backing of which these commentators would not have dared to contradict their own accepted master.⁽¹⁾

After stating the order of succession to bandhudatta etc., Jīmūta introduces the 'ultimate heirs' given by Bṛihaspati.⁽²⁾ Here

(1) The importance of public opinion in interpreting the texts has been admitted by Jīmūta also : see Da.Bha.4.3.36 wherein Jīmūta refuses to follow the textual order of ultimate heirs mentioned in Bṛihaspati's text and to put the husband's younger brother in the end of that order because he might thereby oppose the opinion of the general public. See also Vi.Mi.554 where Mitra Miśra, through fear of violating the established usage, does not allow the sister's son to succeed in preference to the step-son etc. See also Rāmabhadra on Da.Bha.4.3.34-38 for including step-daughter and her son and son's son. For non-observance of an unpopular precept of the śāstra see supra p.42.

(2) Da.Bha.4.3.31, Da.Ta.45-46, Da.Kra.Sam.27.

again is another ambiguity in the Dāyabhāga which seems to have remained unnoticed: he introduces these ^{heirs} with a remark: "On failure of (the line of) heirs ending in the husband, the following rule has been laid down";⁽¹⁾ he again confirms that the heirs mentioned in the text of Bṛihaspati succeed in default of the line of heirs beginning with brother and ending with the husband.⁽²⁾ Now the order which he mentions here is applicable only to bandhudatta etc. or property which is generally termed ayautaka⁽³⁾ by Śrīkṛiṣṇa and others. What about succession to yautaka then? Apparently there is no answer to this in the Dāyabhāga. Raghunandana, who prescribes for ayautaka a different order of succession (i.e. the one prescribed in the verse of Devala), seems to apply Bṛihaspati's verse to ayautaka in default of heirs beginning with the husband and ending with the father.⁽⁴⁾ However Śrīkṛiṣṇa, who in his Dāyakramasaṅgraha has given more systematic provisions for succession to yautaka and ayautaka, says that this order of ultimate heirs is applicable to both yautaka and ayautaka in default of the different heirs which he has already mentioned for those two categories.⁽⁵⁾

Jīmūta admits the right of these ultimate heirs notwithstanding the existence of nearer heirs like the father-in-law etc. only because there is a textual authority in their favour;⁽⁶⁾ but he

(1) Da.Bha.4.3.31.

(2) Da.Bha.4.3.35: "Tadeṣāṃ putrādīnāṃ bhrātrādibhartṛiparyantā-nāñchābhāve.."

(3) See supra Śrīkṛiṣṇa on Da.Bha.4.3.40-42.

(4) Da.Ta.46. The proposition is, however, not free from doubt. He refers to the ultimate heirs as coming after the heirs mentioned in Devala's verse which he utilises in laying down succession ~~to~~ ayautaka.

(5) Da.Kra.Sam.27.

(6) Da.Bha.4.3.35: "Ananyagatervachanāt", also in Da.Ta.47. For 'vachanabala' see supra p. 234.

does not forget to take resort to the principle of spiritual efficacy for the purpose of deciding the order of succession inter se amongst these ultimate heirs⁽¹⁾ and for elongating the list of heirs who, in his opinion, should succeed before these ultimate heirs. His followers are guided by the same principle.

To remind ourselves of Brihaspati's intricate text the ultimate heirs succeed apparently in default of an 'aurasa suta' (aurasa son), 'dauhitra' (daughter's son), and 'tatsuta' (his or their son).⁽²⁾ But Jīmūta derives thence the following meaning:- In the word 'aurasa' he includes both son and daughter because they exclude all other heirs. He interprets 'suta' as denoting a step-son because it is useless to understand this word as qualified by the adjective 'aurasa', because Manu himself terms a step-son as a son of all the co-wives, and because an undesirable contingency of sister's son etc. succeeding notwithstanding the existence of a step-son has in any case to be avoided.⁽³⁾ He then mentions that in default of a son, daughter, and a step-son, the daughter's son succeeds.⁽⁴⁾ The word 'tatsuta' he interprets as denoting the son of a son or of a step-son but not of the daughter's son as the latter does not offer any piṇḍas.⁽⁵⁾ In default of these heirs and of the heirs mentioned in the line beginning with brother and ending with the husband the ultimate heirs succeed.

(1) See infra.

(2) See supra: Tadyāsāma^āauraso na syāt sutodauhitra eva vā/
Tatsuto vā dhanam tāsā^m svasrīyādyāḥ samāpnuyuh//.

(3) Da.Bha.4.3.32, Da.Ta.46, Da.Kra.Sam.27.

(4) Da.Bha.4.3.33. This provision is unique. See infra.

(5) Da.Bha.4.3.34, Da.Ta.46, Da.Kra.Sam.27.

The above comments of Jīmūta have invited further explanations as well as adverse comments from his followers. Śrīnātha, Rāmabhadra and Śrīkṛṣṇa say that the word 'suta' denotes not only a step-son but also his sister i.e. a step-daughter. Together with Maheśvara and Achyuta they point out that a step-son's son also must be included by parity of reasoning.⁽¹⁾

Raghunandana goes a step further and says that by parity of reasoning the word 'step-son' in the Dāyabhāga stands as symbolic of all analogical sons (ātideśikaputra), for "otherwise there occurs an undesirable contingency of a sister's son etc. succeeding notwithstanding the presence of an adopted son etc."⁽²⁾ Śrīkṛṣṇa goes still further and says that the word 'aurasa' itself symbolically denotes the adopted son etc.⁽³⁾ In all these comments a gradual elevation of the place of an adopted son is clearly discernable. The secondary sons who were formerly described as "kṣetrajādi"⁽⁴⁾ came to be known more as "datrimādi" thus denoting that an adopted

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- (1) Their commentaries on Da.Bha.4.3.31-34. Śrīkṛṣṇa in his summary on Da.Bha.4.3.40-42 mentions also step-son's son's son before the husband etc. Rāmabhadra on those very passages appears to be in favour also of a step-daughter and her son and son(s son. But his discussion is a bit ambiguous.
- (2) His commentary: "Sapatnīputrapadaṃ ātideśikaputropalakṣaṇaṃ tulyanyāyāchcha, anyathā dattrimādisattve'pi svasrīyādyadhik-ārāpātāt."
- (3) His commentary: "Aurasapadeneti. ... Etachcha dattrimāderapy-upalakṣaṇaṃ". See also Dr.J.D.M.Derrett: The relationship of a married woman to her husband's adopted son in Hindu theory and practice: a correction, (1959) Zeitschrift für vergleichende Rechtswissenschaft p.1 wherein the author has, upon the information brought to his attention by the present writer, amended his opinion expressed in Adoption in Hindu Law (1957) Zeitschrift für vergleichende Rechtswissenschaft p.34.
- (4) For instance see Achyuta on Da.Bha.4.2.5 supra.

son had already captured the position of a kṣetrajā son who was declared to be absolute in the Kaliyuga. Secondly, the fact that Śrīkṛiṣṇa includes an adopted son in the word 'aurasa' leaves no room for doubt as regards his opinion in a previous passage⁽¹⁾ where he appears to contradict Achyuta's opinion: there he definitely means to assert that an adopted son could share his adoptive mother's strīdhana equally with an aurasa son or a daughter. The reasoning appears to be that but for the exception mentioned by Vasiṣṭha an adopted son is equal to an aurasa son in all respects. It may be objected that an adopted son being really adopted to the father and not to the mother he should not have any, or at least any important, position in strīdhana succession; but as the husband and wife stand, in the eyes of law, as one person it is reasonable to presume that the same act which affiliates an adopted son to his adoptive father also affiliates him to his adoptive mother. This is how the right of the wife, in some cases, to adopt a son to her husband after his death can be properly understood; for this right is of the nature more of a personal right than of a right by way of proxy. Because of this unity of person between husband and wife even illegitimate sons of a woman whether born as a result of adultery or fornication are recognised as sons of the husband.⁽²⁾ Therefore these later authors are perfectly justified in recognising to the fullest extent the right of an adopted son to inherit his adoptive mother's property.

(1) Commentary on Da.Bha.4.2.5 supra.

(2) For instance Kānīna and Gūdhaja. For illegitimate children and their right see infra.

Jīmūta, we have seen, introduces the step-son as an heir somewhat suddenly and gives him a right to succeed even before a daughter's son. Śrīnātha and Rāmabhadra appear to acquiesce in this new addition.⁽¹⁾ But all other commentators take a firm attitude against Jīmūta on this point. Achyuta, Maheśvara, Raghunandana and Śrīkṛṣṇa expressly state that a step-son can succeed only after the daughter's son.⁽²⁾ Achyuta and Śrīkṛṣṇa state that a daughter's son has a preferential right because he is 'progeny' (prajā) of his grandmother.⁽³⁾ They also go to the extent of suggesting that the word 'suta' need not be interpreted as denoting a step-son and that a denial of such an interpretation will not make sister's son etc. succeed notwithstanding the existence of step-son etc., because like the husband, father etc. who have not been expressly mentioned in Brihaspati's text even a step-son can succeed before the sister's son etc. Śrīkṛṣṇa openly suggests that Jīmūta has been self-contradictory here.⁽⁴⁾ Therefore it appears that the doctrine of spiritual efficacy which Jīmūta follows rigidly has in this special instance, been softened down to some extent by his commentators.

Some Bengali scholars and judges were inclined to believe that this para (No.33) which places a step-son before a daughter's son is spurious.⁽⁵⁾ This is evidently a mistake; for the earlier

(1) See supra their commentaries on Da.Bha.4.2 1-7.

(2) Commentaries on Da.Bha.4.3.33.

(3) But see Da.Bha.4.2.21 where a son is preferred to a daughter's son because the latter is not progeny (anaṅgaja).

(4) For his previous provisions state that he succeeds after the son and the son's son respectively to yautaka and ayautaka respectively.

(5)

See Golapchandra Sarkar H.L.(1927)p.735, Mukherji J. in Purna v. Gopal infra.

commentators like Śrīnātha etc. appear to acquiesce in this arrangement. Moreover none of the commentators suggests that this passage was an interpolation. On the other hand they specifically state that this provision is a speciality of Jīmūta.⁽¹⁾ Even Maheśvara who points out some spurious readings in paras 31 and 32 allows para. No.33 to go unchallenged; and this fact is remarkable since he does not agree with the opinion expressed in that paragraph.

Jīmūta specifically repudiates a suggestion that these ultimate heirs should succeed in the absence of the sapinḍas for, he says, (sapinḍas like) the husband's younger brother have already been mentioned in this list of ultimate heirs whereas nearer sapinḍas like the father-in-law have been completely excluded.⁽²⁾ He further states that the order of succession amongst these heirs inter se is not in accordance with the order of actual enumeration but in accordance with the order which is based upon their relative capacity to confer spiritual benefit (upon the proposita); because otherwise the husband's younger brother would succeed as the last amongst the six heirs mentioned in the text - an arrangement which is opposed to public opinion, and because the right of a secondary son to succeed depends upon his relative capacity to replace, for the purpose of conferring spiritual benefit, an aurasa (mukhya) son.⁽³⁾ Jīmūta's

(1) For instance see Śrīkrīṣṇa on Da.Bha.4.3.40-42. See also Raghurāma Śiromaṇi etc. *infra*.

(2) Da.Bha.4.3.40, Da.Ta.48-49. But see Varadarāja *supra*.

(3) Da.Bha.4.3.36, Da.Ta.47.

followers wholly concur in his explanation. Jīmūta and his followers, therefore, state the order amongst these heirs as: husband's younger brother, a son of the husband's elder or younger brother, sister's son, husband's sister's son, brother's son and son-in-law.⁽¹⁾

Jīmūta states that after these heirs the father-in-law, husband's elder brother etc. succeed in order of their relative capacity to confer spiritual benefit.⁽²⁾ Śrīkṛṣṇa enlarges the same order as: father-in-law, husband's elder brother, then other sapinḍas, sakulyas and samānodakas.⁽³⁾ It is quite remarkable that according to the Bengal School succession never devolves upon the father's sapinḍas but upon the husband's sapinḍas alone in all cases. The only heirs to be admitted from a woman's parents' side are the father, mother, brother, sister's son and brother's son.

In the absence of all the above heirs the property of a brahmin woman devolves upon the brahmins of her own town; but the property of a woman who is kṣatriya etc. goes to the Crown by escheat.⁽⁴⁾ The exception in the case of the property of brahmin woman seems to be a counterpart to the same exception in regard to the property of a brahmin male. Taking into consideration the ambiguities of the Dāyabhāga we feel that the more systematic and logical commentary of Śrīkṛṣṇa ought to stand as the correct presentation of the law of the Bengal School.

There are many other authors of minor importance who profess

(1) Da.Bha.4.3.37, Da.Ta.47-48, Da.Kra.Sam.28-29.

(2) Da.Bha.4.3.39, Da.Ta.48.

(3) Da.Kra.Sam.29. See also Vi.Se. f.34(b).

(4) Da.Kra.Sam.29, Vi.Se. f.34(b).

to follow the lead of Jīmūtavāhana. The works of most of these authors are still in manuscript only and hence are inaccessible to the general public.⁽¹⁾ Most of these works contain what is virtually a copy of the provisions in the Dāyabhāga with some slight variations.⁽²⁾ It will be helpful to consider the opinion of these authors on controvertial or ambiguous provisions.

Thus according to Nārāyaṇa and Gaṇeśabhaṭṭa the order given for pitṛidatta applies only to pitṛidatta which is not yautaka i.e. given at the time of marriage.⁽³⁾ But according to Vāreśvara, Vidyāratna Smārtabhaṭṭāchārya, and Kāśirāma - a commentator on the Dāyattva - the order applies to pitṛidatta whether given at the time of marriage or before or after the same.⁽⁴⁾ It need not be stressed that the opinion of Vāreśvara deserves more respect than the opinion of Nārāyaṇa.

With regard to succession to the ayautaka of a childless woman the opinion of Śrīkṛṣṇa to the effect that the order of succession depends upon the form of marriage in which the woman was married, has been accepted by Vāreśvara, Nārāyaṇa, Gaṇeśabhaṭṭa, Anantarāma and Raghurāma Śiromaṇi.⁽⁵⁾ This acceptance leaves no room for doubt that the later authors of the Bengal School preferred

(1) The Dāyakaumudī of Pītāmbara as well as the Dāyabhāgarthadīpikā of Raghurāma Śiromaṇi, however, have been published. A translation of the Vivādārṇavaseta compiled by Vāreśvara and others is available under the name: "The Code of Gentoo Laws".

(2) Vi.Se.f.32(b)-34(b), Smr.Sa.Vya.f.42(b), Smr.Rat.f.55(a-b), Vya.Sa.San.f.32(b)-33(a), Da.Vya.San.f.i(b), Sma.Vya.f.56(b), Da.Ta.Ti.f.27(b), Smr.Sa.Sam.f.44(b)-45(b), Da.Bha.Nir.f.8(b)-10(a), Vi.Chandrikā f.41(a)-44(b), Da.Kau.18-21, Da.Bha.Di. verses 59-72.

(3) Vya.Sa.San.f.33(a), Da.Vya.San.1(b).

(4) Vi.Se.f.33(a), Smr.Sa.Vya.f.42(a), Da.Ta.Ti.f.27(b).

(5) Vi.Se.f.33(a), Vya.Sa.San.f.33(a), Da.Vya.San.f.1(b), Vi.Chandrikā f.43(a), Da.Bha.Di.p.18 verse 67.

to follow Śrīkṛiṣṇa as against Jīmūta on this matter. The order of succession is thus unanimously brought nearer to the Mitākṣarā School.

Similarly Vāreśvara, Nārāyaṇa, Anantarāma, Śrīkara, Vāch-
aspati Miśra and Raghurama support Śrīkṛiṣṇa as against Jīmūta in
holding that a daughter's son succeeds before a step-son.⁽¹⁾ The only
author who openly opposes such an amendment is Rāmanātha the author
of the Smṛitiratnāvali.⁽²⁾

Rāmanātha's opinion on another point deserves special
attention. Rigidly following the doctrine of spiritual efficacy he
says that in default of an aurasa son or daughter the secondary sons
like kṣetraja etc. succeed and in default of these secondary sons
only can a step-son succeed. He specifically adds that out of
forgetfulness Jīmūta has failed to mention the secondary sons.⁽³⁾
The opinion must be given due weight in determining the exact loca-
tion of secondary sons in strīdhana succession and in considering
whether or not a woman's illegitimate children have a right to
succeed to their mother's property.

It is now necessary to review the development of the case
law in order to establish how far it conforms with, or departs from,
the Śāstric law on the subject.

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- (1) Vi.Se.f.33(a), Vya.Sa.San.f.32(b), Vi.Chandrikā f.41(b),
Da.Bha.Nir.f.8(b), Smr.Sa.San.f.45(a), Da.Bha.Di. verses 59
and 66-67.
- (2) Smr.Rat.f.55(a-b), the same view probably is found in Sma.
Vya.f.55(b).
- (3) "Strīdhane tu aurasaputra kanyābhāve 'nyeṣāṃ putrāṇāṃ tadabhāve
sapatnīputrasyeti. Teṣāṃ mātṛipārvaṇakarṭṛitvena sapatnīputra-
bādhakatvāt. Jīmūtasya tu viśmṛitiratra..." Smr.Rat.55(a-b).
But as against this see Kamalākara supra.

Turning now to the development of the judicial law on strīdhana succession we find that the tendency of the development was to close the ranks between the different authors of the same school. Thus it has been held that the Mitākṣarā is of paramount authority in southern India and that the authority of the Smṛitichandrikā is of no avail against that of the Mitākṣarā;⁽¹⁾ that the law of the Mitākṣarā school is the law of the Mithila school except a few instances in which the latter expressly differs from the Mitākṣarā,⁽²⁾ that the Mitākṣarā and the Mayūkha should, as far as possible, be interpreted in harmony with each other⁽³⁾ except in the case of devolution of strīdhana on the progeny of the woman herself.⁽⁴⁾ In the Bengal School this unification of the law was brought about by subduing the authority of all later authors to that of Jīmūta.⁽⁵⁾ This process of integration makes the resumé easier to give, but renders the mistakes in the law much more apparent. Indeed in the beginning the law of the two leading schools was also unjustifiably intermixed⁽⁶⁾ and this confusion led to mischief which, though partly repaired, has cast permanent impressions upon the judicial law as it is current (in appropriate contexts) today.

The Mitākṣarā Succession:

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- (1) Simmani Ammal v. Muthammal (1880)3 Mad.265, Bhujanga v. Ramayamma (1884)7 Mad.387, Muthappudayan v. Ammani Ammal (1898)21 Mad.58, Raja Grammani v. Ammani (1908)29 Mad.358, Mahalakshmi v. Suryakanta A.I.R.1940 Mad.494.
- (2) See infra pp.444. See also p.446.
- (3) See infra pp.443,447.
- (4) See infra pp.469-71.
- (5) See infra pp.477-76.
- (6) See infra pp.410-11, 416, 446.

According to the text of the Mitākṣarā a married woman's strīdhana other than śulka devolves upon maiden daughters, married daughters who are indigent or childless, and married daughters who are wealthy. The judicial law has accepted this order of preference excepting the fact that the right of a childless daughter, to succeed in preference to a daughter possessing children has been totally neglected.⁽¹⁾ To understand the root of this error it is necessary to know that according to the Mitākṣarā the same text of Gautama which applies to strīdhana succession applies also to succession to a male's property⁽²⁾ so that the order of preference stated above is applicable in both cases, whereas Jīmūta admits in the line of succession to male's property only those married daughters who have or are likely to have a male issue.⁽³⁾ Unfortunately the first Mitākṣarā case on this point came before their Lordships of the Calcutta High Court who may have been more conversant with the law of the Bengal school than that of the Mitākṣarā School. Distinguishing the law of the Benares from that of the Bengal school as regards succession to strīdhana their Lordships remarked: "By the law of the Benares School preference is given to the maiden daughter; failing her the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters who succeed in default of indigent daughters. But no preference is given to a daughter who has or is likely to have a male issue, over a daughter who is barren

(1) In Mysore the Smritichandrikā is preferred to the Mitākṣarā in determining the order of succession to anvādheya - Nagamma v. Moodelliar (1881)4 Mys.L.R.241.

(2) Mit.on Yaj.II 135-36 Nirṇayasāgara Ed. p.221.

(3) Da.Bha.11.2.1-3; Da.Kra.Sam.4-5.

or a childless widow."⁽¹⁾ There is no reference to any text in this case but it is evident that their Lordships have taken into consideration Vijñāneśvara's comment only at one place where he explains the word 'apratīṣṭhitā' as meaning 'indigent',⁽²⁾ and have neglected his comment at another place where he explains the word as meaning 'indigent or childless'.⁽³⁾ On the authority of Macnaughten the same negative proposition in favour of a childless widowed daughter was confirmed by their Lordships of the Privy Council in Uma Deyi v. Gokoolanund⁽⁴⁾ wherein one of the contesting parties was a childless widowed daughter. Instead of stating that indigent or childless daughters have preference over daughters who have wealth or children respectively their Lordships remained content with laying down that a daughter who has or is likely to have a male issue cannot have preference over a childless widow.

Both the above cases pertained to succession to father's property, belonged to the Benares school and arose in the Calcutta High Court, but the decisions have been followed by all the High Courts⁽⁵⁾ in laying down the law of the Benares, Southern or the Bombay school for succession either to father's property or mother's strīdhana.⁽⁶⁾ Accordingly it has been held that the expression

(1) Binode Koomaree v. Purdhan Gopal (1865)2 W.R.176.

(2) Mit.on Yaj.II 135-36.

(3) Mit.on Yaj.II 145. See supra.

(4) (1875) 5 I.A.40.

(5) See below.

(6) Bakubai v. Manchabai (1864)2 B.H.C.R.5, Poli v. Narotam (1869) 6 B.H.C.R.183; Audh Kumari v. Chandra Pai (1880)2 All.561; Simmani v. Muthammal (1880)3 Mad.265; Danno v. Darbo (1882)4 All.243; Totawa v. Basawa (1893)23 Bom.229; Manki Kunwar v. Khundan Kunwar (1922)A.I.R.1925 All.375; Parvathibai v. Maruthi A.I.R.1945 Bom.69; Savitribai v. Sidu (1944)I.L.R.1945 Nag.871; Rajamma v. Padmavattamma A.I.R.1951 Mad.1047; Sheo Prasad v. Jankibai A.I.R.1953 Bom.321.

'apratisthitā' means 'unprovided for', 'indigent' or 'unendowed' as opposed to 'possessed of means', or 'endowed' and that comparative poverty is the sole criterion for settling the rival claims of

married daughters.⁽¹⁾ A daughter whose husband is rich cannot be included in the term 'unprovided for', although her father did not make any provision for her.⁽²⁾ "Though the Courts ought not to go minutely into the question of comparative poverty, yet when the difference in wealth is well-marked, the law requires that the whole property should pass to the poorest sister."⁽³⁾ A poor sister is not bound to prove a definite acquisition on the part of her rich sister; it is enough if the surroundings are such that the latter would be regarded as a rich woman.⁽⁴⁾ When all the daughters are equally indigent they inherit equally whether any one of them is childless or not.⁽⁵⁾ It has also been held in a recent case that the rule of preference being limited to competition between unendowed and endowed daughters, where all the daughters are endowed ones they shall succeed simultaneously and equally notwithstanding the fact that the husband of one of them is eight times richer than that of the other.⁽⁶⁾ Though this decision is not directly opposed to the previous ones

(1) See the above cases after 2 All.561. According to the Mitāk-
ṣarā School a betrothed daughter must be treated as an unmarried
daughter and not as a married one, for according to Yājñavalkya
the strīdhana of a daughter who is betrothed but dies before the
marriage does not go to the proposed husband but to the parents,
see Yaj.II 148; see also Banerjee p.403, Gupte 590.

(2) 4 All.243 supra.

(3) 23 Bom.229 at 232 supra.

(4) A.I.R.1925 All.375 supra.

(5) Rajamma v. Padmavatumma A.I.R.1951 Mad.1047.

(6) Sheo Prasad v. Jankibai A.I.R.1953 Bom.321.

it seems that the trend of the previous cases was to lay down that if there is a marked difference between the pecuniary circumstances of the daughters the rule of preference comes into operation;⁽¹⁾ for even according to the test of comparative poverty, the preference given to a more indigent daughter over a less indigent one is in fact understandable only on the basis that the latter is more 'endowed' in comparison with the former; hence there is no reason why the 'less endowed' amongst the two 'endowed' daughters should ^{not} have a preference over the other, the former being 'unendowed' in comparison with the latter.

It is clear that the judicial decisions have neglected the rule of preference in favour of a childless daughter; the Courts have never even referred to the opinion of many authors who maintain that the term 'apratisthitā' includes also widowed or unfortunate daughters.⁽²⁾ Banerjee suggests that the priority should be decided firstly on the criterion whether a daughter is rich or indigent, that amongst the rich daughters a childless one should be preferred to one having children and that amongst the poor daughters distribution should be made in accordance with the circumstances of each case. He says that otherwise it would be difficult to decide the priority between a childless rich daughter and poor daughter having children.⁽³⁾ The objection is without any foundation since both the qualifications

(1) See Manki Kunwar v. Kundan Kunwar (1922) A.I.R. 1925 All. 375; Savitribai v. Sidu I.L.R. 1945 Nag. 871. Rajadhyksha J. in Sheo Prasad's case distinguished the previous cases, however, on the ground that none of them dealt with a contingency of two rich sisters competing with each other.

(2) See Lakṣmīdhara, Aparārka, Chandeśvara, Mitra Miśra etc. supra.

(3) Banerjee pp. 403-4.

(namely, childlessness and indigence) being equally important, both kinds of heirs should succeed equally.⁽¹⁾ The real order ought to have been laid down as follows: that daughters who are either indigent or childless should succeed in preference to daughters who are neither indigent nor childless, that amongst the first class of heirs daughters who are both indigent and childless being doubly unfortunate should succeed equally in preference to those who are poor but possessing children or rich but childless, that these latter two kinds of daughters should succeed equally, and that in default of all these daughters ^{these} who are neither childless nor indigent take equally.

In Ganga v. Ghasita⁽²⁾ their Lordships of the Allahabad High Court laid down that in the Mitākṣarā system a woman succeeds to strīdhana by reason of her consanguinity and not because of her capacity to confer spiritual benefit and that a profligate woman can neither be precluded from inheriting strīdhana nor be divested of her inheritance merely on the ground of unchastity. It was also held that Nārada's text⁽³⁾ prohibiting degraded persons from sharing inheritance and Kātyāyana's text⁽⁴⁾ providing for the divesting of a shameless or extravagant woman have become obsolete and unenforceable in the Courts. No authority was cited for this second proposition

(1) See p.

(2) (1875)I.L.R.1 All.46 F.B. A case in W.Macn.Vol.II p.132 was distinguished as not pertaining to strīdhana.

(3) Nārada cited in Mit.on Yaj.II 140 mentions 'patita' amongst the excluded heirs.

(4) Kātyāyana cited in Smr.Cha.659.Vi.Mi.545. The text is discussed in detail in the next chapter dealing with degraded persons and prostitutes. It is important to note here that according to Mitra Miśra the text provides for both exclusion from inheritance and divestment of an already vested property.

which will be discussed at length in the next chapter. Since then the right of an incontinent daughter to succeed to her mother's strīdhana has never been rejected by the Courts.⁽¹⁾

In Tara v. Krishna,⁽²⁾ however, Chandavarkar J. laid down that a daughter who in maiden condition became a prostitute succeeds only in default of both maiden and married daughters. He observed that the order of succession according to the Mitākṣarā is unmarried daughter and then married daughter and that a prostitute daughter is neither the one nor the other. The decision was followed in Govind v. Bhiku⁽³⁾ wherein it was held that even an unmarried daughter who becomes a concubine is excluded by a chaste married daughter. The reasoning purporting to sustain these unjustifiable decisions has been as follows: that according to the Mitākṣarā unmarried (anūḍhā) and married daughters succeed in that order;⁽⁴⁾ that for the word 'unmarried' Parāśara and Devala use the words 'virgin' (kumārī) and 'maiden' (kanyā) respectively;⁽⁵⁾ that the essential test of maidenhood is eligibility for marriage⁽⁶⁾ which presupposes virginity

(1) Advappa v. Rudrava (1879)4 Bom.104, Angammal v. Venkata (1902) 25 Mad.509, Tara v. Krishna (1907)31 Bom.495, Govind v. Bhiku A.I.R.1945 Bom.55. The case was followed in Nogendra v. Biroy (1902)30 Cal.521 arriving at the decision that even according to the Bengal school an unchaste mother can succeed to her daughter's strīdhana.

(2) (1907)31 Bom.495.

(3) A.I.R.1945 Bom.55. But the status of a concubine is nearer to that of a wife than a prostitute. See Mit.on Yaj.II 290: "Paraparigrihitatvena tāsām paradāratulyatvāt."

(4) Mit.on Yaj.II 135 and II.145 pertaining to paternal and maternal wealth respectively.

(5) See the text quoted in Da.Bha.11.2.4-5. In the Devanāgarī edition (1829)p.271 the editor rightly points out that the quotation attributed to Parāśara is non-existent in his smṛiti and hence spurious.

(6) 31 Bom.495 at 506, A.I.R.1945 Bom.55 at 57(a) supra.

of the bride;⁽¹⁾ that a concubine or a prostitute being dispossessed of that state belongs neither to the married nor to the unmarried category; that such daughter has been recognised as an heir only recently as a result of which she comes in after the specified heirs in accordance with the maxim 'the intruders are to be included at the end'.⁽²⁾

The whole discussion about the Śāstra is misleading. Firstly Vijñāneśvara does not refer to Parāśara or Devala and does not use the words 'Kumārī' or 'Kanyā'. These two texts appear to have been unnecessarily imported from the Dāyabhāga. Secondly virginity is not at all a desideratum for marriage; a non-virgin girl could be given in marriage⁽³⁾ and even a widow could remarry.⁽⁴⁾ Thirdly, once it is admitted that unchastity is no bar in succession to property except in the case of a widow⁽⁵⁾ succeeding to her

(1) Medhātithi on Manu IX 132 was cited as an authority. See also Mit.on Yaj.II 290.

(2) A.I.R.1945 Bom.55 at 58(a). The maxim was accepted from Vya. Ma.143 (Kane's notes p.248): "Āgantūnāmante niveśah." Dr.Kane gives several references where this maxim has been utilised. See Śaṅkara's bhāṣya on Bra.Su.IV 3.3 and the commentary Bhāmatī of Vāchaspati Miśra on the same. The maxim is more clearly explained in the commentary Vedāntakalpataru on the same passage. See also Śabara on Jai.Su.10.5.1. An 'āgantu' is a thing which has no 'sthāna' or place amongst the enumerated things. So when it comes along with the enumerated things under a text it can come only after the enumerated things; for it does not possess any 'sthāna' of its own. For 'sthāna' see Jai.Su. referred to in the introduction p.10.

(3) That is how 'Kānīna' could become a son of the person who married his mother. See infra.

(4) See the introduction.

(5) Gunga v. Ghosita (1879)1 All.46 F.B., Advyappa v. Rudrava (1880) 4 Bom.104 (Daughter), Kojiyadu v. Lakshmi (1882)5 Mad.149 (mother), Vadammal v. Vedanayaga (1908)31 Mad.100 (mother), Dal singh v. Mt.Dini (1910)32 All.155 (mother), Baldeo v.

husband's estate it is impossible to conceive how, in the absence of any Śāstric authority, an order of preference amongst the same class of heirs can be set up on the basis of chastity and unchastity. In such a case like this the simple rule, namely, that the heirs of the same class succeed equally and simultaneously, ought to have been applied.⁽¹⁾

Even amongst the Jains, in the absence of a custom to the contrary, an unmarried daughter succeeds in preference to a married daughter and the authority of the Jaina texts like Bhadrabāhusaṃhitā etc. is not sufficient to set aside the established rule of Hindu law.⁽²⁾ In Bombay the watan property which by inheritance becomes the strīdhana of a woman devolves upon a male heir in preference to female heir on account of a specific enactment to that effect;

Mathura (1911)33 All.702 (mother), Annapurnamma v. Venkamma (1926)51 M.L.J.387 (daughter), Ram Pergash v. Mt. Dahan bibi (1924)3 Pat.152 (daughter), Akoba harman v. Sai Genn I.L.R. 1941 Bom.438. Especially in strīdhana succession unchastity is no ground for exclusion at all: 1 All.46 F.B. supra, 4 Bom. 104 supra, Angammal v. Venkata (1903)26 Mad.509, Nagendra v. Benoy (1903)30 Cal.521.

- (1) Jai.Su.10. 3.13.53: 'Samam syādaśrutatvāt' referred to in Vi.Mi.548, Smr.Cha.647, Mit.on Yaj.II 265 and Da.Bha. supra p. 340.
- (2) Jaiwanti v. Annandi (1937) A.I.R.1938 Nag.62. According to Bhadrabāhusaṃhitā (Champat Rai Jain: The Jaina Law p.117) both unmarried and married daughters succeed equally. The text was noted with ^{the} remark of Dr.Gour: Hindu Code edi.3 p.1476: "The Jains acknowledge the authority of a digest of their laws contained in a work known as 'Bhadrabahusaṃhita' stated to have been compiled in the third century B.C. ..." Following Chotaylall v. Channo Lall (supra.) it was held that Jains are governed by Hindu law in the absence of proof of a custom to the contrary.

consequently a son or even the husband is preferred to a daughter.⁽¹⁾

According to a custom amongst the Nattukottai Chetti community the 'strīdhanam' which is given to a bridegroom by her father-in-law is meant for the benefit of the bride and the children of the marriage⁽²⁾ but the latter have no joint interest with their mother and succeed to the same only after her death.⁽³⁾ Therefore it appears that the same rule of preference would be applicable to succession to such property.

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- (1) Balai v. Subba (1926) 29 Bom.L.R.246, Fakigauda v. Dyamva (1932) 57 Bom.488. In the former case the illegitimate son of the proposita was preferred to her illegitimate daughter; in the latter the husband was preferred to a daughter. Sec.2 of Bom.Act V of 1886 which amends sec.4 of Bom.Act III of 1874 is as follows:- "Every female member of a watan family other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female; shall be postponed in order of succession to any watan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such watan, or part thereof, or interest therein." When a female becomes an absolute owner of a watan, the watan family is her family and not the family of the original male watandar; the word 'family' in such case has ordinary dictionary meaning and includes the husband though not the daughter's son - Bai Laxmi v. Magenlal 41 Bom.677, Balai v. Subba (supra.), Hanmant v. Secretary of State (1929) 54 Bom.125, Fakirgauda v. Dyamva (supra.) However, the Act is not applicable to Kathiawar and there the daughter succeeds to her father's watan according to order of succession laid down by ordinary Hindu Law - Mazmudar Iayashankar v. Bai Krishna (1904) K.L.R.XIV.3 & 5.
- (2) Palamappa v. Nachiappa (1941) II M.L.J.558, Subramania v. Sivakami 1944 I.M.L.J.38.
- (3) Official Receiver of South Arcot v. Kulandaivelan A.I.R.1946 Mad.519 confirmed by the P.C.in Kulandaivelan v. Official Receiver of South Arcot A.I.R.1949 P.C.332, The Official Receiver of Ramnad v. Lakshmanan I.L.R.1947 Mad.325. In Palaniappa's case it was held that the person who accepts money as a deposit knowing it to be strīdhana becomes a trustee in favour of the children who are cestui que trusts and that under s.10 of the Limitation Act they could recover the money without being affected by the statutory period. The same case was followed in Subramania's case wherein it was held that the receiver being trustee the liability arose under the Madras Act IV of 1938 and

(continued on the next page)

In the Madras High Court it was held that the provisions of the Mitākṣarā being preferable to those of the Smṛitichandrikā a widowed daughter is entitled to succeed to her mother's strīdhana and succeeds in preference to a daughter's daughter,⁽¹⁾ though Devanna does not give her right of succession at all. It may be added that the Court came to the right conclusion by a wrong process; for Devanna, though he disallows the right of a widowed daughter to succeed to her father's property,⁽²⁾ does not totally exclude her in succession to her mother's strīdhana.⁽³⁾ His opinion is very similar to that of Jīmūta.

A daughter's daughter succeeds in default of daughter and even in a case where the succession once devolved upon the daughter and reverts after her death to the heirs of her mother, daughter's daughter succeeds in preference to son's son or daughter's son.⁽⁴⁾

that the amount cannot be scaled down in accordance with the provisions of the Insolvency Act for payment during insolvency. But in A.I.R.1946 Mad.519 supra the Mad.H.C. overruled these previous decisions and overlooked or neglected, without giving special or additional reasons, the custom of joint interest of the bride and children which was implicitly recognised in the previous decisions: a glaring instance of how a rule of customary law can be more easily tampered with than a rule of Śāstric law recognised by the Courts.

(1) Mahalakshmi v. Suryakanta A.I.R.1940 Mad.494.

(2) See Smr.Cha.686. He specifically mentions that here the word 'apratisthā' does not include a daughter who has become so by reason of her widowhood or barrenness. But he gives these latter alternatives in explaining the same word while giving succession to strīdhana - see Smr.Cha.p.663.

(3) See supra.

(4) Subramania v. Arunachalam (1904)28 Mad.1 F.B., Sham Bihari Lal v. Ramkali (1923)45 All.715, Ramkali v. Gopal Dei (1926)48 All. 648, Amarjit v. Algu (1928)51 All.478, Matru Mal v. Mehri Kunwar A.I.R.1940 All.311, Venkateswaralu v. China Raghavala 1955 Andh.W.R.39. In Sheoshanker v. Debi Sahai (1903)30 I.A.202 the apparent effect of the decision of their Lordships of the P.C. was preference in favour of the daughter's son as against the

Daughter's daughters take per stirpes and not per capita. But this is only because of the textual provision to that effect and this representation is not so complete as to give a daughter of a pre-deceased daughter a right to succeed along with another daughter of the proposita.⁽¹⁾ In such a case she may receive only something

"out of affection".⁽²⁾ It has been held in *Ramkali v. Gopal Dei*⁽³⁾ that the rule of preferring unmarried to married daughters cannot be extended to daughters' daughters. Their Lordships in this case

daughter's daughter. But the case was distinguished in *Subramania's* case which was followed by all the later cases and their Lordships of the Madras High Court relied upon the following points: that the decision in *Sheoshankar's* case was given ex parte: that the daughter's daughter was not a party to the suit and jus tertii in her favour was not pleaded; that decision was based on only one issue, namely, whether strīdhana inherited by a daughter becomes her own strīdhana or not; that the view of Macnaghten that such inherited strīdhana does not become strīdhana of the daughter was accepted but that his view that it devolves upon the heirs of the daughter was not accepted; that according to *Hari Dayal v. Grish Chunder* (1890)17 Cal.911 and *Sheo Pertab v. Allahabad Bank* (1903)25 All.470 at 489 the property devolves upon the strīdhana heirs of the original proposita, in which case daughter's daughter shall succeed in preference to daughter's son. Mayne who was counsel in *Sheoshankar's* case states that he brought most of these points to the notice of their Lordships of the P.C. and that they did prefer daughter's son to daughter's daughter.

See Mayne 9th Edit. p.993 and 11th Edit. p.730. But see *Ramkali's* case 48 All.648 at 657-58 and other following cases wherein Mayne's explanation has been disregarded under a reasoning that personal statement of counsel published anywhere except in a recognised law report is not to be taken into consideration in interpreting a judicial decision. See Mac.Vol.I p.38 which was the basis of the decision in *Sheoshankar's* case. It must be added that in this latter case there is a vague remark to the effect that strīdhana once devolved does not devolve again as strīdhana. For the ambiguity in this remark see *infra*. Surely when strīdhana of a mother has devolved upon her daughter, whether it becomes strīdhana of the daughter or not, it would devolve after the death of the daughter, upon strīdhana heirs either of the mother or of the daughter.

(1) See *supra* p.366 Mayne p.745. Also *infra* pp.422-23.

(2) See Mayne *supra* p.745, Banerjee p.411. See *Brihaspati's* text *supra*.

(3) 48 All.648 *supra*.

observed that the case of a daughter's daughter is to be distinguished from that of a daughter as a mother is under a legal obligation to provide for the maintenance or marriage expenses of daughters and held that both married and unmarried daughter's daughters succeed simultaneously.⁽¹⁾ Although there appears to be nothing in the Śastra to throw doubt upon the decision of their Lordships,⁽²⁾ their reasoning is not invulnerable: it is a gratuitous presumption to suppose that an unmarried daughter succeeds in preference to a married daughter because the mother is under a legal obligation to provide for her marriage expenses or maintenance. No commentator gives such a reasoning;⁽³⁾ moreover, the mother is not under a legal obligation to provide out of her strīdhana, for the maintenance or marriage expenses of her daughter.⁽⁴⁾

In default of the daughter's son succession devolves upon the son and then upon son's son. This position as stated in the Mitākṣarā has never been challenged in the Courts.

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- (1) But their shares would be equal only in a case where all of them have a common mother or different mothers each of whom has equal number of daughters.
 - (2) But see Da.Da.Slo. f.38(a)., wherein Durgayyā ambiguously pleads for such a preference with stronger reason amongst the daughter's daughters.
 - (3) On the other hand see *Supra* p.390. Achyuta and Śrīkṛṣṇa state that an unmarried daughter is preferred as she belongs to the same gotra.
 - (4) The responsibility is solely placed upon the males of the family. Devaṇṇa does adopt the reasoning of their Lordships and prefers, on the authority of Gautama's sūtra, an unmarried daughter to a married daughter as the father of the former is bound to maintain her. - Smr.Cha.687. But he explains this in relation to paternal property. In dealing with the same sūtra of Gautama in succession to maternal property he does not give this explanation at all. The reason is obvious.

On the dubious authority of Sir Francis Macnaghten it was held in Sengamalathammel v. Velayyudha⁽¹⁾ that daughters succeed to their mother's strīdhana jointly with rights of survivorship; the ratio of this decision was that in Hindu law co-heirs usually succeed with rights of survivorship.⁽²⁾ The correctness of this decision has been doubted by some scholars,⁽³⁾ and the ratio of the same has been overruled in the later decisions even of the same High Court. In Bai Parson v. Bai Somli⁽⁴⁾ Chandavarkar J. dealt with many extracts from the Mitākṣarā and the Mayūkha and held that succession to strīdhana forms obstructed succession according to these two treatises; that co-heirs succeeding to the obstructed heritage take as tenants-in-common and that, therefore, sons succeeding to their mother's property take as tenants-in-common and not as joint tenants. In Karuppai v. Sankaranarayanan⁽⁵⁾ their Lordships of the Madras High Court distinguished the decision in Venkayamma v. Venkataraman-ayamma⁽⁶⁾ and held that sons succeeding to the estate of their mother take as tenants-in-common and not as joint tenants. Observing that it would be revolutionary to hold that all property which comes to

(1) (1867)3 M.H.C.R.312, see also Kattama Nachiar v. Dorasinga Tevar (1871)6 M.H.C.R.310 at 333 wherein the same observation has been made as regards the succession of daughters to

addition to p.422 note 2 : See also Gunnam Papamma v. Valluri Kamaraju 1955 Andh. W.R.779.

s except the Bombay school inherited property is not strīdhana; so whether daughters are held to succeed jointly or otherwise the course of further devolution of strīdhana would be the same. But in Bombay it would make a tremendous difference.

(4) (1912)36 Bom.424.

(5) (1903)27 Mad.300 F.B.

(6) (1902)29 I.A.156.

jointmembers is taken jointly⁽¹⁾ their Lordships pointed out that though there is some similarity between unobstructed heritage and strīdhana succession in as much as the grandchildren inheriting strīdhana take per stirpes, there is also a dissimilarity, namely, that sons of a predeceased son do not succeed simultaneously with another son of the proposita.

The rights of illegitimate children⁽²⁾ to succeed to their mother's property have been recognised without much hesitation but not without encroaching upon the śāstra and not without leaving some complications in the order of succession also. In the Śāstra there does not appear to be any express authority for the right of illegitimate children to succeed to their mother's strīdhana. It has always been recognised that an illegitimate son of a śūdra is not nullius filius but quasi nullius filius.⁽³⁾ Excepting the case of an illegitimate son of a śūdra illegitimate children have no right at all in succession to male's property.⁽⁴⁾ But in the case of strīdhana the

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- (1) 27 Mad.300 at p.305. Their Lordships pointed out for instance that property which comes to joint members by devise or gift is not taken by them as tenants-in-common - Reman Persad v. Radha Beeby (1846)4 M.I.A.137 at 174, Bai Diwali v. Patel (1902)26 Bom.445. Their Lordships however very skillfully distinguished the decision in Venkayamma v. Venkataramanayamma 25 Mad.678 which they appear to accept with some difficulty. See also Mt.Munia v. Manohar Lal A.I.R.1941 Oudh 429 wherein the same line was taken. Although the headnote in this case shows that sons taking the strīdhana of their mother take as tenants-in-common the facts relate to joint brothers taking as tenants-in-common the strīdhana of the sister of their grandmother.
- (2) For an almost exhaustive account of the illegitimate children's right to succeed see Dr.J.D.M.Derrett: Inheritance by, from, and through illegitimates at Hindu Law 57 Bom.L.R.1-21; More about illegitimacy at Hindu Law 57 Bom.L.R.89; Kamalakara on illegitimates 58 Bom.L.R.177.
- (3) Pandaiya v. Puli Telavar (1863)1 M.H.C.R.478; Mayna bai v. Uttaram (1864)2 M.H.C.R.196.
- (4) See Mayne 633; Gupte 398; Mulla (1946)36.

rule judicially decided is entirely different. In Mayna Bae v. Uttaram⁽¹⁾ it was laid down that sons of a brahmin married woman who are born of an adulterous intercourse with a European are entitled to inherit their mother's strīdhana and can also inherit each other's property. Observing further that even a son of concealed birth (Gudhaja or quaesitus filius) could be a son of the husband himself their Lordships further remarked that mere adultery is not the disabling stigma which codes based upon Christianity have made it.⁽²⁾ It was also observed that a mother could also succeed to the property of her illegitimate children. The reasoning of their Lordships forms the basis of many later cases and hence it deserves to be quoted: "That the illegitimate offsprings of women of the lowest Hindu classes succeed to the property, both of their mother and one another, without question or dispute, we can, upon our own experience, affirm. It would be illogical if it were otherwise, for the illegitimate son of a sudra, in the absence of preferable sons, is his heir. That the property is almost invariably small of itself prevents the question from coming before the Courts. Further, the practice is so well understood that litigation would be hopeless. We may refer, by way of analogy, to the practices of Malabar and Canara which received Hindu law not in its present state, but in a condition in which all races are observable in the books. There

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- (1) 2 M.H.C.R.196 supra. But see *Saraswati Bai v. Kashiram* (1884) C.P.L.R.IV.43 (an illegitimate daughter, especially one born of adulterous intercourse, is not entitled to inherit her mother's property.
- (2) 2 M.H.C.R.196 at 199, *Manu* XI.177-78 was referred to for expiation for adultery.

concubinage is the rule, and the whole law of inheritance is based upon the existence of heritable blood between the mother and son, quite irrespective of the father."⁽¹⁾ Their Lordships claimed to substantiate their reasoning also from the point of view of justice, equity and good conscience and for this purpose they elicited support from the Roman Jurists.⁽²⁾

It is not easy to see how the reasoning as regards the śūdras was also extended to the brahmin proposita also. But as, on the authority of Abbé Dubois, their Lordships considered the woman to have been so degraded as to have become 'hopelessly outcaste',⁽³⁾ and lower than a śūdra, it seems that they thought it proper to apply the rules about illegitimate sons of a śūdra woman to illegitimate sons of a degraded brahmin woman also.

Since heritable blood or sapindaśhip can be traced through a common mother as well as through a common father⁽⁴⁾ an illegitimate daughter is also considered to have been entitled to succeed to her mother's property in the absence of nearer heirs.⁽⁵⁾ In Subbayya v.

- (1) 2 Mad.H.C.R.196 at 201-2.
- (2) See Gaius Dig.Tit.VIII fr.2 & 3, Justinian Inst.III.Tit.V 4 quoted by their Lordships to the effect that a spurious son has heritable blood with his mother and also with a brother who is equally spurious.
- (3) For succession to degraded woman's property see next chapter.
- (4) 2 M.H.C.R.196 supra, Narayan v. Laxman (1927)51 Bom.784 at 793, Dattatraya v. Matha Bala (1934)58 Bom.119, Viswanatha v. Doraiswami (1925)48 Mad.944.
- (5) Arunagiri v. Ranganayaki (1898)21 Mad.40, Dundappa v. Bhimva (1921)45 Bom.557. It is not clear whether the ratio in these cases applied to illegitimate offsprings of twice-born classes also; but their Lordships in the second case have relied solely upon a statement in Ghose's H.L.3rd edi.p.763 which appears to confer this right of succession upon all illegitimate children in general.

Chandrayya⁽¹⁾ it was held that illegitimate daughters of women of all castes have a right to succeed to their mother's strīdhana since there is no difference between the status of a degraded woman of one caste and another. As amongst the illegitimate children themselves an illegitimate daughter succeeds in preference to an illegitimate son by way of analogy from the rule of preference amongst the legitimates.⁽²⁾ With regard to competition between legitimate and illegitimate children the law has not been uniform. In Meenakshi v. Muniandi⁽³⁾ it was held that a legitimate son succeeds in preference to an illegitimate daughter. In Jagannath v. Narayan⁽⁴⁾ Chandaravarkar J. held that strīdhana goes to the husband in preference to a son born of an adulterous intercourse, as terms like 'woman', 'husband', 'issue' etc. are used in the Mitākṣarā with co-relative sense so that such a son cannot be included in the word 'issue' so as to override the husband's right to succeed.⁽⁵⁾ The same line has been adopted in Meenakshi's case, wherein Sheshagiri Ayyar J. observed that words denoting issue cannot be interpreted with a duplicity of meaning so as to include both legitimate and illegitimate children.⁽⁶⁾

(1) (1941)II M.L.J.442.

(2) Subbayya v. Chandrayya (1941)II M.L.J.442, Krishnarao v. Kumarajamma second appeal n.80 of 911 (illegitimate daughter preferred to illegitimate son) referred to in Meenakshi v. Muniandi (1914) 38 Mad.1144 at 1153, Naramayya v. Tiruvengadathan (1913)24 M.L.J.223 (legitimate daughter's daughter is preferred to illegitimate son born later on in prostitution) - referred to in 38 Mad.1144.

(3) (1914)38 Mad.1144.

(4) (1910)34 Bom.553.

(5) 34 Bom.553 at 559.

(6) Ghose's opinion to this effect was rejected, see report at p.1148. For "duplicity of meaning" his Lordship quoted the Adhikaranakāumadī (quotation misprinted) and cited Regina v. Poor Law Commissioners for England and South Wales. In re

It is strange that both these cases tend totally to deny the right of succession of an illegitimate child which was so easily and emphatically recognised in Mayna Bae's case.⁽¹⁾ In a recent case of Venkanna v. Narayanamma⁽²⁾ their Lordships of the Madras High Court have taken an altogether different view. In this case it was held that the word 'prasūtā' (one who has given birth to children) inclusively refers to both legitimate and illegitimate children and that they succeed to their mother's strīdhana equally and simultaneously.

None of these decisions can be regarded as stating the correct position of the Śāstric law or as a coherent presentation of ^{the} judge-made law. There can be no doubt that the word 'prasūtā' used by Yājñavalkya and Vijñāneśvara definitely refers to a married woman (ūdhā) and, presumably, to her legitimate issue.⁽³⁾ Although illegitimate children of a woman are declared to be heirs of her husband⁽⁴⁾ they are nowhere declared to be heirs of the woman herself and the

Holborn Union (1838)6A & E56, S.D., 112 E.R.21; In re Kirkcaldy Brewery Co.(1877)5 Ch.D.535-38 Mad.1144 at 1150-51. The rule of Adhikārṇakaumudī referred to in this case has been mentioned in Kishorilal Sarkar's Mimamsa Rules of Interpretation p.276 (referred to in 57 Bom.L.R.89 supra at 93). But the present writer was unable to trace the same in the edition of the Sanskrit text published by the Chowkhamba series. But for the same arthaikatva rule see supra p.9 note no.6.

- (1) But see Dundappa v. Bhimava (1920)45 Bom.557 wherein Sir Norman Macleod C.J. observed that it has never been disputed that illegitimate children are heirs to their mother's property.
- (2) A.I.R.1954 Mad.136. For a vigorous and the best possible argument in favour of the ratio of this decision see the articles of Dr.J.D.M.Derrett in 57 Bom.L.R.supra.
- (3) Mit.on Yaj.II 145: "Sarveṣeveva vivāheṣu prasūtāpatyavatī chet..."
- (4) See 'kanīna' and 'gūdhaja' admitted as heirs to a male in Mit. on Yaj.II 132., wherein Vijñāneśvara specifically rejects the opinion of Viṣṇu to the contrary.

reason also is obvious, namely, that secondary sons of a man are admitted as his heirs on account of their capacity to confer spiritual benefit upon him⁽¹⁾ whereas there is no such possibility in the case of a woman as *piṇḍas* are not offered to women at all.⁽²⁾ But since their Lordships in *Mayna Bae's* case held upon their personal, though probably dubious, knowledge,⁽³⁾ that illegitimate children are

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- (1) Yaj.II.132: '*Piṇḍadomśaharaśchaiṣām...*'. See also the alleged text of Manu quoted in Bal.on Yaj.II.135 to the effect that a sonless person should, for the performance of his '*piṇḍakriyā*', try 'to make' a son by hook or by crook.
- (2) It must be noted here again that the cadre of secondary sons of women which appears to have been specially created on the analogy of secondary sons of men does not include her illegitimate children but her legitimate relations like sister's son, stepson etc. It is true though awkward that according to the *Śāstra* an illegitimate son of a woman could be an heir to her husband but not to herself. The reason for the former alternative is only the expediency of conferring spiritual benefit. The reason becomes all the more pertinent when one sees that there is no reference to illegitimate daughter at all in succession either to male's or female's property. And even if it were possible for the heirs to confer spiritual benefit upon the woman also, it was improbable that illegitimate sons would have been admitted as heirs; for the whole law of succession to *strīdhana* is based upon equitable reasoning and not upon spiritual efficacy and generally prefers females to males. Usually according to the leading authors of *Smritis* an *unaurasa* does not succeed in presence of an *aurasa* and gets only maintenance or gets only a fraction of a share. - See Yaj.II 132. Manu IX 163, Manu IX 194,

Addition to p.428 note 2:

However, for an illegitimate son's right to perform the funeral ceremony of his mother see *supra* p.348 note 4.

Yaj.II 132 and admit the rule mentioned therein that twelve sons succeed only in the order mentioned. Manu's verse (IX.184) specifically states that a son born of a sinful origin succeeds only in default of a better son.

- (3) As pointed by Ayyar J. in *Meenakshi's* case the opinion of their Lordships of the P.C. in *Mayna Bae's* case were not in full support of the opinion of their Lordships of the Madras High Court in the same case. See *Mayna Bae v. Ootaram* 8 M.I.A. 400 at 423 wherein their Lordships of the P.C. clearly state that the heritable capacity of the illegitimate sons to succeed to their mother's *strīdhana* has not been established and that if there was a custom to that effect it was not in proof. But see their Lordships of the Madras High Court (when the case was

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(continued)

entitled to succeed to their mother's property among the śūdras and extended this rule to the other classes also, the right of illegitimate children to succeed to their mother's property has become an established rule and must be followed on the principle of stare decisis. Once it is admitted that these are entitled to succeed to their mother's property their inclusion in the word 'issue' becomes inescapable. But from a profitable analogy of succession to male's property⁽¹⁾ it must be suggested that in strīdhana succession also a legitimate issue ought to be preferred to an illegitimate issue.

But this rule of preference should be applied only to legitimate and illegitimate heirs of the same class and not if those

remitted to them with these remarks) held the custom to be proved upon their personal knowledge and without recording any evidence in favour of the custom. Under s.57 of the Indian Evidence Act Judicial Notice can be taken of Acts, Rules and Regulations etc. but the provision of the section do not authorise a Court to take judicial notice of a custom. Sarkar on Evidence 4th Edi.p.403 states 'Court can take judicial notice of a custom which is very general' and quotes in support of this statement Baijnath v. Bhadur 91 I.C.583, and Bagridi v. Rahim 93 I.C.332. But a casual glance at the reports would show that their Lordships in both these cases were themselves not sure about this stand and relied upon additional grounds to hold the respective customs proved. Not a single case can be quoted in favour of the stand taken by Sarkar. On the other hand see Gurdial's case infra.

- (1) It need not be said that the relation of an illegitimate child with its mother is more definite than with its father. See for instance 57 Bom.L.R.i at p.13 where the learned author of the article suggests that an illegitimate son of a daughter should be preferred to an illegitimate son of a son. Such an argument may hold water from sociological rather than the legal point of view; for even when an illegitimate son is admitted or proved to be a son of a man the relation of the former with the latter is as 'definite' in the eyes of the law as the relation of the latter with his legitimate son. The only difference is in the former case it has to be proved whereas in the latter it is, subject to certain conditions, a conclusive presumption.

two belong to different classes,⁽¹⁾ for instance in the order of succession a legitimate daughter should be preferred to an illegitimate daughter but a legitimate son should not be preferred to an illegitimate daughter; for a son succeeds in default of daughters who, according to the established rule, would include both legitimate and illegitimate daughters. The rule should be applied mutatis mutandis to an illegitimate daughter's legitimate daughter or son, illegitimate son and illegitimate son's legitimate son all of whom would take place immediately after their legitimate equals. It need not be added, therefore, that the decision given by Chandavarkar J. in Jagannath v. Narayana that⁽²⁾ strīdhana goes to her husband in preference to her son born of an adulterous intercourse does not stand to reason. The precept of the Śāstra in such case had since long been set aside by the case-law.

It has been held in Viswanatha v. Doraiswami⁽³⁾ that the legitimate descendants of a woman's illegitimate children are heirs to one another. The ratio of this decision is that heritable blood can be traced through a common mother as well as through a common father.⁽⁴⁾ Naturally they are heirs to the woman herself also.

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- (1) This suggestion is based on an analogy from succession to male's property - though the secondary sons succeed in default of an aurasa son the wife succeeds only in default of aurasa as well as secondary sons who also include illegitimate sons - see Mit. on Yaj.II 135-36, Vi.Mi.488, Smr.Cha.672-73, Vi.Ta.382, Rāghv-ānanda on Manu IX.181.
- (2) (1910)34 Bom.553, see also the suggestion of Dr.J.D.M.Derrett in 57 Bom.L.R.at p.27.
- (3) (1925)48 Mad.944, Veeranna v. Satyam A.I.R.1948 Mad.10.
- (4) See 48 Mad.944 at 954 wherein Nandapandita has been referred to as including son of the same mother in the line of heirs. To accept heirship of legitimate descendants of an illegitimate child Ramalinga v. Pavadai (1902)25 Mad.519 was followed - See report at p.955-57.

In Duttatraya v. Matha⁽¹⁾ it was held that a daughter born of a woman by an adulterous intercourse is entitled to succeed to her brother similarly born. A similar decision could be expected in a case where the brother claims as an heir to her strīdhana. But the Courts have refused to extend the equitable consideration in favour of illegitimate children of a female to the illegitimate children of her legitimate children. It has accordingly been held in Meenakshi v. Ramaswami⁽²⁾ that an illegitimate daughter of a legitimate daughter is not entitled to succeed to her grandmother's strīdhana in preference to her grandmother's sister's grandsons. Her right was later totally denied in Meenakshi v. Muragayya.⁽³⁾ On the same principle the right of an illegitimate son of a daughter was totally denied in Madras⁽⁴⁾ and in Nagpur.⁽⁵⁾ As an illegitimate son of a male cannot succeed to the property of a legitimate son⁽⁶⁾ and vice versa,⁽⁷⁾ it has been correctly held in Pandurang v. Administrator General of Bombay⁽⁸⁾ that the legitimate collaterals of a woman cannot succeed to the strīdhana of her illegitimate daughter. It is thus to be rejoiced that as regards the right of illegitimate descendants the encroachment upon the Śāstra which was made in

(1) (1933)35 Bom.L.R.1131.

(2) (1937)1 M.L.J.28.

(3) I.L.R.(1940)Mad.739.

(4) Veeranna v. Satyam A.I.R.1948 Mad.10.

(5) Sadu Gunaji v. Shankerrao A.I.R.1955 Nag.84. But see the ratio of Venkanna v. Narayannamma wherein all legitimate and illegitimate descendants such as daughter, daughter's daughter, daughter's son and son's son are placed on an equal footing.

(6) Dharma v. Sakharam (1919)44 Bom.185.

(7) Zipru v. Bomtya (1921)46 Bom.424.

(8) A.I.R.1953 Bom.127.

Mayna Bage's case under the cover of custom was not allowed to develop into a wider mischief.

A convert to Hinduism would be governed by Hindu law. Accordingly it was held that the property of a Muslim woman who lives as a concubine with a Hindu and gets herself converted later on to Hinduism, would constitute her strīdhana; that the children which have been born from her paramour to her before the conversion would be her illegitimate children and that they would succeed to their mother's strīdhana in the same order in which the legitimate children succeed.⁽¹⁾ property⁽²⁾

The illegitimate son of a śūdra is an heir to his property⁽²⁾ and the putative father of a śūdra also is an heir to his property.⁽³⁾ It should be expected, therefore, that amongst the śūdras the illegitimate son of the husband of a woman should be entitled to succeed to her strīdhana as her husband's heir. But his right has expressly been denied in Ayiswaryanandaji v. Sivaji⁽⁴⁾ upon the ground that an illegitimate son has no right to succeed to the collaterals.

Bapu Appa v. Kashinath⁽⁵⁾ was a strange case wherein there was competition between the sons born from two different husbands of

(1) Sunderi Devi v. Thaboo Lal A.I.R.1957 All.215.

(2) Mayne pp.633-36; Gupte pp.398-400.

(3) See the excellent judgement of Kumaraswami Sastriyar J. in Subramania v. Rathnavelu (1917)41 Mad.44 F.B. wherein the learned judge strongly advocates that the position of a dāsīputra is in all respects equal to that of an aurasa according to the Śāstra and that the Śāstra has been pushed aside by the case-law only.

(4) (1925)49 Mad.116. See the report at pp.136-37 and pp.154 onwards. The latter part is from the judgement of the same Kumarasami Sastriyar J. (written here as Sastri). It is doubtful if such a son can be called the collateral of the woman.

(5) A.L.R.1934 Bom.113.

a woman. The appellant contended that by remarriage the widow ceased to have any connection with the first family and the first son. Their Lordships observed that remarriage was not recognised in Hindu law; that if this argument is 'pushed to its logical conclusion' the second son would be illegitimate; that there is no text or authority on this particular question but that as succession to strīdhana depends upon natural love and affection both sons are entitled to succeed equally to their mother's strīdhana. The reasoning of this decision is really perverse. Manu expressly provides for a case wherein a woman has two sons from two husbands.⁽¹⁾ According to this verse of Manu each son would exclusively share the strīdhana of his mother which was given to her by his own father. As regards property acquired by herself Śrīkṛiṣṇa⁽²⁾ while commenting on the same verse says that both the sons share equally. The category of strīdhana has not been specifically stated in this case. But the above rule of the Śāstra could have been accepted for guidance.

According to the Śāstra the adopted son can hardly be included in the word issue (prajā) and it has already been seen that excepting the authors of the Bengal school and Durgayyā none of the commentators includes adopted son within the word 'prajā'. But the drift of the case-law which developed in the High Courts has been quite different right from the beginning. In Teencowree v. Dinon-

(1) See Manu IX.191 supra and the commentaries especially of Kullūka and also of Sarvajñanārāyaṇa, Rāghavānanda, Nandana and Rāmachandra. See also Kauṭilya supra. A deserted or a widowed woman can remarry and the son of the second marriage was called paunarbhava. See Manu IX.175 and the commentaries of these five commentators. Remarriage is also recognised by custom in several parts of India. See infra.

(2) Da.Kra.Sam.56.

ath⁽¹⁾ their Lordships of the Calcutta High Court observed: "An adopted son has all the rights and privileges of a son born. He is the son of the father and of the mother, and succeeds to the paternal property, and also to the streedhan of his adoptive mother in the absence of daughter as a son born would do." In later cases the same position was given to a Kṛitrima son in the Mithila school.⁽²⁾ Their Lordships do not appear to have had any textual authority before them but they relied mainly on the authority of Macnaghten.⁽³⁾ In Pudmakumari v. Court of Wards⁽⁴⁾ their Lordships of the Privy Council held that 'An adopted son occupies the same position as a natural-born son except in a few instances which are accurately defined in the Dattaka Chandrika and Dattaka Mimamsa". Their Lordships really meant to elevate the adopted son to the position of an ausura son as regards succession both to a male's property and strīdhāna; for in a later case they held that an adopted son of a daughter could succeed as a daughter's son in preference to brother's son's son.⁽⁵⁾

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- (1) (1865)3 W.R.49. See Norton's leading cases part I.p.101 for a case decided against the right of an adopted son to inherit his adoptive mother's property. On the other hand see W.B.Digest of Hindu Law 4th.edi.pp.480,1034,1038 wherein cases in favour of the adoptive son's right are cited.
- (2) Collector of Jirhoot v. Huropershad (1867)7 W.R.500, Boolee Singh v. Mt.Busunt Koeree (1867)8 W.R.155.
- (3) The texts referred to in Teencowree's case. were Sutherland's Dattaka Chandrikā Synopsis p.219 1834 edi.p.153, the Dāyakrame-saṅgraha p.57 sec.5, Macnaghten's H.L.Vo.I 39-40. In Huroper-shad's case Mac.H.L.Vol.I p.76 was relied upon. In Boolee Singh's case besides other texts 'Ovaita Nirnaya of Vaeshpati Misra' was referred to.
- (4) (1881)8 Cal.302 P.C. Their Lordships of the P.C. referred to, and based their decision upon, Sumbhoochander v. Naraini I Suth. P.C.J.25 wherein it was held that notwithstanding the fact that in Da.Bha.10.8 Jīmūta has denied to an adopted son a right of collateral succession he succeeds both lineally and collaterally.
- (5) Kalikomul v. Uma sunker (1883)10 Cal.232. Mayne favours the view adopted in this decision whereas Banerjee appears to be against it. See Mayne p.745 and Banerjee p.412.

It is interesting to note that reports of none of the above-mentioned cases contain a reference to the authority of the commentators in favour of the right of the adopted son to be treated as an aurasa son in strīdhana succession. It is strange that none of the text-book writers excepting Bhattacharya⁽¹⁾ appears to have had even the faintest suspicion that there exists a textual authority in favour of an adopted son. On the other hand they seem to think that there is no śāstric authority at all in favour of an adopted son.⁽²⁾

Once it is admitted that an adopted son is equal to an aurasa son the question which inevitably arises is: what should be the rights of an adopted son and an aurasa son when in competition? There has been no judicial authority on this point. The opinion of Śrīkṛiṣṇa, which may be considered even in determining the law of the Mitākṣarā School, appears to be that they should share equally.⁽³⁾ The trend of the ratio in Pudmakumari's case points in this direction only. On the same principle of equality between an adopted and an aurasa son a daughter's adopted son should be preferred to an aurasa son himself. An argument, despite the clearest law on the subject, that the law of succession to strīdhana is based upon natural love and affection should not be resorted to to arrive at an incorrect conclusion to the contrary.⁽⁴⁾

(1) Commentaries on Hindu law 2nd Edi.p.599 wherein the author mentions the authority of Śrīkṛiṣṇa only but states that he says nothing about the share taken by an adopted son in competition with an aurasa son.

(2) See for instance Gupte p.609.

(3) See supra pp.377-78, 402-3.

(4) See Banerjee p.412.

A son adopted by a son in conjunction with one of his wives becomes the step-son of another wife hence he succeeds to her, not as her adopted son but as her step-son.⁽¹⁾ But the position of a son adopted by a bachelor who subsequently marries has remained undecided. The better view, it is submitted, is to treat the son as an adopted son of his adoptive father's first wife and not as her step-son; otherwise there would be an anomalous position that a person without ever having had an adoptive mother has an adoptive step-mother. Moreover as the union of husband and wife which results from marriage is retrospective in effect⁽²⁾ it is better to hold that the first wife of a man shares the motherhood of a boy adopted by her husband before their marriage.

It has long since been admitted that a step-son is entitled to inherit his step-mother's strīdhana.⁽³⁾ The commentators who recognise his right rely upon the text of Manu⁽⁴⁾ which says that a son of one of the co-wives becomes the son of all the co-wives.⁽⁵⁾ But there is a great difference between the Bengal and the Mitākṣarā Schools on this point. On the principle of spiritual efficacy the Bengali authors treat him as an issue of the step-mother herself

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- (1) Gangadhur v. Hiralal (1916)43 Cal.944 at 972. But see Bhattacharya: Commentaries on H.L.p.599 where the author says that there cannot be an atideśa of atideśa and that therefore the adopted son of one of the co-wives should not be held entitled to inherit the strīdhana of another co-wife. From the point of view of Mīmāṃsā the argument is no doubt irrebuttable.
- (2) See Haradatta and Bālabhaṭṭa (supra p. 46) who state that by marriage the wife acquires ownership in husband's property gained not only after the marriage but also before the marriage.
- (3) Teencowree v. Dinonath (1865)3 W.R.49.
- (4) Manu IX 183.
- (5) See Da.Bha., Vi.Mr., Vi.Ta. etc. supra.

whereas the authors of the Mitākṣarā School fix this position after the husband presumably giving him a right to succeed only as a husband's sapinda.⁽¹⁾ Moreover, as Vijñāneśvara specifically excludes⁽²⁾ non-uterine (bhinnodara) children and includes only uterine ones in the line of succession, it cannot be argued that in view of the words like 'prajā' or 'jananī' appearing in Manu's and Yājñavalkya's texts the step-children should be admitted in default of the natural progeny; for that would infringe the maxim of unity of sense (arthaikatva).⁽³⁾ In Vijñāneśvara's mind the words 'prajā' (progeny), 'apatya' (child) and 'sodara' have but one sense; "for let it not be overlooked that although in the translation by Colebrooke the text of the Mitakshara is divided into different paragraphs, in the original the passage appears as one continuous and unbroken discussion."⁽⁴⁾ The only exception made by Vijñāneśvara in favour of step-children is that of a step-daughter of a higher

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- (1) Smr.Cha.666, Vi.Mi.553-54, Vi.Ta.465 etc. supra. It must be stated that the comment of Mitra Miśra on Brihaspati's text is slightly ambiguous though he introduces the ultimate heirs as coming in default of the heirs already spoken of (i.e. the husband, father etc.) who succeed to the strīdhana of a childless woman. It may be added again that Vi.Ta.467 which reads as if a husband succeeds in default of step-son's son etc. is a misprint and the other reading viz. 'Bhrātrijah' accepted in the other version must be preferred to 'bhartā' which is printed in the text of the edition.
- (2) Mit.on Yaj.II 145.
- (3) Kumarila "Sakṛiduchcharitaḥ śabdaḥ sakṛidevārthaṁ gamayati" - quoted in Bhattachaya: commentaries on H.L. edi.2nd p.63, see also a reference to the same in Da.Mi.II 35, Vya.I.i.11-15, Da.Bha.III.ii.30, Bhimacharya v. Ramacharya (1909)33 Bom.452 at 457, Gangadhar v. Hiralal (1916)43 Cal.944 at 967. This is called the arthaikatva maxim for which see the Mimamsa Rules of Interpretation p.78-98 supra p.9.
- (4) 43 Cal.944 at 967-68 supra.

caste and her children.⁽¹⁾

Moreover the declaration of Manu⁽²⁾ that a son of one of the co-wives makes him the son of all does not put him in the position of a son for the purpose of succession to their property; for Sarvajñanārāyaṇa takes this provision as prohibiting niyoga whereas Kullūka and Rāghavānanda interpret the same as preventing the other co-wives from adopting another son. In the immediately preceding verse⁽³⁾ Manu similarly declares the son of one of the brothers to be the son of all the brothers, and the above commentators interpret the verse as preventing procreation of a kṣetrāja.⁽⁴⁾ Vijñāneśvara who quotes⁽⁵⁾ this verse promptly says that this verse is intended only to prevent the creation of other secondary sons and not for the purpose of advocating the sonship (putratva) of such a son for that would contradict the position stated by Yājñavalkya⁽⁶⁾ in laying down the line of succession known in modern Hindu law as the compact series of heirs.⁽⁷⁾

(1) Mit.on Yaj.II 145 supra.

(2) Manu IX 183 supra.

(3) Manu IX 182.

(4) Only Kullūka connects this provision with Yaj.II 132 (supra 'piṇḍadomśaharaśchaisām' etc.) but says that his position is determined by Yaj.II 135-36 only, which means that he does not succeed as a son.

(5) Mit.on Yaj.II 132.

(6) See Yaj.II 135-36.

(7) For the same explanation see Smr.Cha.670-71, Vi.Mi.477. Vijñāneśvara does not refer to Manu's provision about step-son but Devaṇṇa and Mitra Miśra refer to the same and connect it to the provision about the brother's son giving the same explanation for both. Mitra Miśra states that such an explanation would apparently come into conflict with provision that a step-son is entitled to succeed, in default of the husband, to his step-mother's strīdhana but that the conflict would be resolved at a proper place. However he does not resolve the same in the portion dealing with strīdhana and meekly admits that he does

In Bhimacharya v. Ramacharya⁽¹⁾ most of the above points were noted and it was held that the husband of a woman succeeds in preference to her step-son. In Gangadhar v. Hiralal⁽²⁾ it was confirmed that a step-son can succeed only as a husband's sapinda and not as a son.

Something must be said about the position of the great-grandson. He does not appear in the line of succession given in the Mitākṣarā.⁽³⁾ It is surprising that most of the text-books writers do not refer to him at all.⁽⁴⁾ Mr. Gupte refers to him and says that he can succeed only as husband's heir or⁽⁵⁾ father's heir but the author does not refer to him at all in the line of succession which he lays down for the strīdhana of a childless woman.⁽⁶⁾ Both Mitra Miśra⁽⁷⁾ and Kamalākara⁽⁸⁾ allow him to succeed in default of a grandson and that ought to be his place. Otherwise if he is allowed

succeed in default of the husband. One thing is certain, namely, if a step-son at all succeeds according to Mitra Miśra he succeeds in default of the husband.

(1) (1909)33 Bom.452.

(2) (1916)43 Cal.944. It was held that the position of a son adopted by a co-wife was the same. In Maiyan Dalip v. Sri Mohun Bikram I.L.R.1944 All.315 the adopted son of the husband was preferred to the sister; apparently he was treated as a step-son. The case is notable for two things, firstly, the property involved was worth Rs.6,000,000 showing how large an estate could be owned by a woman as strīdhana; secondly this is one of those cases in which an off-hand decision is given without giving a reference to any case, text or text-book on which the decision is or could have been based.

(3) Mit.on Yaj.II 145 supra.

(4) See Mayne pp.744-46, Bhattacharya Commentaries on Hindu Law 2nd edi.pp.480 & 484, Sarkar H.L.6th edi.pp.731-32, Banerjee pp.421-428.

(5) Gupte: H.L.p.591.

(6) Ibid p.592. It is surprising that the greatgrandson of a co-wife is mentioned here as well as in Mayne p.746.

(7) Vi.Mi.554.

(8) Vi.Ta.454.

to succeed as a husband's sapinda even a step-son or step-grandson of the proposita would exclude her own great-grandson - a contingency least to be expected by any author of the Mitākṣarā school; moreover his position would be much more precarious if the proposita were married in an unapproved form.

In default of the above-mentioned progeny succession goes to the husband and his nearest sapindas if the proposita was married in an approved form. It goes to the mother, father and father's nearest sapindas if her marriage was celebrated in an unapproved form.

If the proposita was married in an approved form any heir from the former line succeeds in preference to any heir from the latter line. So the husband's collateral is preferred to her own brother;⁽¹⁾ the husband's brother's daughter is preferred to an adopted son of her maternal uncle or of her sister's daughter.⁽²⁾ The husband himself, of course, succeeds in preference to any other heir like a stepson,⁽³⁾ woman's own sister⁽⁴⁾ or her son born of an adulterous intercourse.⁽⁵⁾

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- (1) Champut v. Shiba (1886)8 All.39. See also Laxman v. Sadashiv A.I.R.1955. Madh Bha.138 (husband's sister's daughter preferred to the woman's own brother according to the Bombay school).
 - (2) Venkatasubramaniam v. Thayarammah (1898)21 Mad.263. The decision was given in favour of the plaintiffs on the principle that females could succeed as Bhinna-gotra sapindas according to the established case-law.
 - (3) Bhimacharya v. Ramacharya (1909)33 Bom.452.
 - (4) Govind v. Dawlat 6 N.L.R.3-5 I.C.426 - referred to in Sarkar 6th edi.p.732.
 - (5) Jagannath v. Narayan (1910)34 Bom.553. The objection to this decision has been discussed before supra p.430. See also Ponamma v. Nallakannu (1889)8 T.L.R.167 (the husband preferred to the mother); Rangappa v. Basamma (1919)24 Mys.C.C.R.387 (step-daughter preferred to mother's brother's son); Eranagappa

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The question of determining the husband's nearest sapinḍas is, however, not so easy and is beset with two difficulties: firstly what basic principle should be adopted in determining the order of succession amongst such sapinḍas; secondly whether the text of Bṛihaspati which enumerates the secondary sons of a woman affects the line of succession.

As regards the first reference there are two opinions. According to Kamalākara the husband's sapinḍas would succeed to strīdhana of a woman in the same order in which they succeed to the separate property of the husband himself.⁽¹⁾ According to this rule the heirs to strīdhana of a childless widow would be her step-son, step-son's son, step-son's grandson, co-wife, step-daughter, step-daughter's son, mother-in-law, father-in-law etc. But Messers West and Bühler suggest another principle based upon the literal construction of the Mitākṣarā:⁽²⁾ they say that according to the words 'nearest (pratyāsanna) sapinḍas' all the heirs who are related to the husband in the first degree viz. the co-wife, step-son, and

v. Halappa 16 M.C.C.R.99 (husband's brother's son preferred to sister's son). There is no custom to the contrary amongst the Vellalas of Travancore - Ambalavanan v. Thankavadiwoo (1885) 7 T.L.L.80. But amongst the Kathis of Jetpur the jiwai grants which a father bestows upon his daughter revert, after her death, to the father and his heirs in preference to the husband according to a special custom. However the 'hathgarna' grants are different from the jiwai grants and it seems they follow the ordinary course of succession - see Government Resolution In re Kumribai and other appellants (1909)K.L.R.XX.145. Similarly amongst the brahmins of Nagercoil all property of a childless married woman except her śulka devolves, by special custom, upon the parental family in preference to the husband.

(1) Vi.Ta.462 and 465 referring to Yaj.II.135-36 as showing the order of succession.

(2) See W. & B.pp.484-85.

father-in-law and mother-in-law should succeed simultaneously, then the heirs who are related to the husband in the second degree should come in and so on. Taking into consideration the general policy of Vijñāneśvara of preferring the nearest amongst the nearer heirs of a deceased⁽¹⁾ it seems improbable that he wanted to confer a simultaneous right upon many nearer heirs. The former interpretation is, therefore, much more reasonable and has been accepted by the Courts⁽²⁾ as well as by text-book writers.⁽³⁾ Accordingly a co-wife succeeds in preference to the husband's collateral,⁽⁴⁾ a grandson of a co-wife in preference to the co-widow or husband's brother's son,⁽⁵⁾ a co-wife in preference to husband's brother or husband's brother's son,⁽⁶⁾ a step-son in preference to the woman's sister's son,⁽⁷⁾ a co-wife's daughter in preference to the husband's brother's son,⁽⁸⁾ the husband's full-brother in preference to husband's half-brother.⁽⁹⁾

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- (1) For instance a full brother is preferred to a half-brother see Mit.on Yaj.II 135-36.
- (2) See *infra*.
- (3) Mayne 746; Sarkar 732; Gupte 591-93; Mulla (1946)140.
- (4) *Krishnai v. Shripati* (1905)30 Bom.333 (W.& B.3rd edi.p.362) Baner.2nd edi.p.
- (5) *Gojabai v. Shrimant Shanajirao* (1892)17 Bom.114.
- (6) *Bai Kesserbai v. Hunsraj* (1906)30 Bom.431 P.C.
- (7) *Brahmappa v. Papanna* (1889)13 Mad.138. But see the report at p.140 where Wilkinson J. appears to be reluctant to accept this position and doubts the correctness of the ratio in *Baccha Jha's* case (*infra*). He says none except Devanna is in favour of such a proposition. But see Vi.Mi.554 wherein Mitra Miśra says that he prefers step-son and observes that to hold that the secondary sons succeed in preference to him would be opposed to an already established practice.
- (8) *Nanja Pillai v. Sivabagyathachi* (1910)36 Mad.116. To prefer a step-daughter to husband's collaterals reliance was placed upon *Kamalākara*.
- (9) *Parmappa v. Sidappa* (1906)30 Bom.607 (Smr.Cha., W.& B.3rd edi. p.518). But see *Bhattacharya: Commentaries on Hindu Law* 2nd edi. p.580. *Bhattacharya* states the right only of an unmarried daughter of a rival wife of a superior caste and that too not

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Although the author of the Mayūkha mentions the right of a woman's own nearest sapinḍas the order does not change very much for it has been held that the Mayūkha and the Mitākṣarā are to be interpreted in harmony with each other and that the identity of the husband and wife being the leading principle of the Mitākṣarā, or rather of the whole of Hindu law, the sapinḍas of the husband are the sapinḍas of the wife.⁽¹⁾ Similarly the Mithila school does not

only in preference to that of collaterals but to the right of the husband as well. That statement is based upon an entirely different text and is not applicable to the present case.

- (1) Telang J. was the first to lay down this principle in *Gojabai v. Shahajirao* (1893)17 Bom.114. It was approved in toto in *Kesserbai v. Hunsraj* (1906)30 Bom.431 P.C. at 442-44 and followed in *Jodha v. Darbari Lal* A.I.R.1928 Oudh 339, *Paramappa v. Sidappa* (1906)30 Bom.607, *Jotiram v. Bai Divali* A.I.R.1939 Bom.154. See 17 Bom.114 at pp.118-19 & p.122 wherein Telang J. advocates for the principle of identity of husband and wife and relies upon *Lallubai v. Cassibai* 5 Bom.121 W.& B.3rd edi.518, *Siromani* p.389, *Banerjee* p.377 etc. See also *Lallubai v. Mankunwarbai* (1876)2 Bom.388 at 423 approved in 30 Bom.P.C.431 at 443 to show that co-wives also are sapinḍas of each other. In *Jodha v. Darbari Lal* (supra) the expression 'collateral heir' used in Oudh Rent Act XX of 1886 as amended by Act IV of 1921 was to be interpreted. Misra J. observing that even in common parlance a husband's nephew is also considered to be the nephew of the wife held that the husband's collaterals are the collaterals of the wife. But see the headnote to *Nathalal v. Babu Ram* (1935) 63 I.A. 155 wherein the nephew of the husband is described as 'nephew-in-law' of the wife - an expression utterly unknown to Hindus. See the judgement of Batty J. reprinted in *Kesserbai v. Hunsraj* (1906)30 Bom.431 P.C. at 434 wherein the learned judge raises an interesting point that on the principle of identity of husband and wife the co-wife is to be preferred to anybody who is not the issue of the female proposita. This means that she should succeed in preference to the step-son etc. See the two principles of inheritance, namely, funeral oblations and survivorship discussed in *Katama Natchiar v. Rajah of Shivagunga* (1963)9 M.I.A.543 at 614-15. But against the enunciation of their Lordships of the P.C. see Goldstucker's Paper *op.cit.*p.19. Though the sapinḍas of the husband are sapinḍas of the wife the converse is not true; the reason is "wife's subordinate position and dependence" - *Janglubai v. Jetha Appozi* (1908)32 Bom.409 at 413.

lay down separate rules for succession to strīdhana of a childless woman so there would be no difference to this point between the law of the Mitākṣarā and of the Mithila schools.⁽¹⁾

As regards the text of Br̥hispati about secondary sons of a woman, the provisions of the Mitākṣarā were confused in the beginning - as was usual in those days - with the provisions of the Dāy-abhāga. It may be recalled here that the heirs mentioned in that text are the sister's son, husband's sister's son, husband's brother's son, brother's son, son-in-law and husband's younger brother. Once it is accepted that strīdhana devolves upon the husband's sapin̄das in the same order in which his own separate property does, it is very difficult to accommodate the above heirs in that order. They obviously cannot succeed in the order of enumeration; for no direct suggestion to that effect has been made by the commentators ^{of any except the Southern school} who quote that text. On the other hand Mitra Miśra⁽²⁾ and all authors of the Bengal school⁽³⁾ repudiate such a suggestion. Moreover there is no point in postponing the husband's brother to the husband's brother's son. Whether in the order of enumeration inter se or not, it is possible to fit this group of heirs ^{only} by three ways into the accepted order given by Kamalākara: (i) that they should succeed after the husband but before his sapin̄das; (ii) that they should

(1) "The law of the Mithila school is the law of the Mitākṣarā except in a few matters in respect of which the law of the Mithila school has departed from the law of Mitaksara" - Surendra Mohan v. Hari Prasad (1925)52 I.A. 418 at 437, quoted in Kamal prasad v. Murli Manohar A.I.R.1934 Pat.398 at 404.

(2) Vi.Mi.554: they should succeed inter se in order of propinquity after the great-grandson, of a co-wife but before the sapin̄das like father-in-law etc. *supra* p.346.

(3) See *supra* pp.405-6.

succeed after the husband and his sapinda, and (iii) that according to the distributive construction they should succeed as husband's or father's sapinda as the case may be according to the form in which the proposita was married.⁽¹⁾ The first two views cannot be accepted because the group of secondary sons includes heirs some of whom are sapinda of the husband and some are not, and this would come into conflict with the order accepted by Nīlkaṇṭha, Chāṇḍeśvara, Devaṇṇa etc. that the nearest sapinda succeeds in default of the husband. So to accept either of these two interpretations would be equal to denying the position of secondary sons to these heirs and then there is no reason why they should not succeed only according to the general rule of preference according to propinquity. Thus Brihaspati's text has no value at all in settling this order.

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- (1) In *Kesserbai v. Hunsraj* (1906)30 Bom.431 P.C. at 447 it was noted that the Dāyabhāga, the Vīramitrodaya, Vyavasthā-chandrikā, West & Buhler, Banerjee, Golapchandra Sarkar were in favour of the second interpretation. Jenkins C.J. in the same case in the Bom.H.C. was also in favour of the same view. See report at p.436. The Sudder pundits in *Sree Narain Rai v. Bhya Jha* 2 Mac.Rep.29 were in favour of such construction. Sarkar himself succeeded as a counsel in establishing his view in *Mohun Pershad v. Kishen Kishore* (1893)21 Cal.344 but failed to do so in *Jagannath v. Ranjit* (1897)25 Cal.354 since when the view had always been rejected. According to Banerjee p.455 these heirs come in after the husband or parents as the case may be. Mayne gave a wrong translation of Brihaspati's text. See Mayne 5th edi.p.767 referred to in Banerjee p.456. Colebrooke also has translated the verse incorrectly - see Theodor Goldstucker: On the deficiencies in the present administration of Hindu law, a paper read at the meeting of the East India Association (London 1871)pp.11-12, also infra p.486.

But in Bunwaree Lal v. Mt. Parbuttee⁽¹⁾ the judges of the Sudder Diwani Court of Bengal depended upon the authority of Sir William Macnaghten⁽²⁾ who has confused the Mitākṣarā and the Dāyabhāga law on this point and held that according to the Mitākṣarā law the husband's sister's son is entitled to succeed in preference to husband's uncle's son. However, in Bacha Jha v. Jugmohan Jha⁽³⁾ their Lordships of the Calcutta High Court observed that Bṛihaspati's text has not been mentioned at all in the Pārijāta - the oldest

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- (1) S.D.H.R.Beng.(1858)Part II p.976.
- (2) Mac.H.L.Vol.I.p.39 referred to wherein he states the Dāyabhāga order and adds 'I do not find that the law in this particular varies materially in different schools.' A precedent of a Tirhoot case (Mithila) given Mac.H.L.Vol.II 35 was also quoted with approval. But for Macnaghten's authority the honourable judges would have followed the general rule of Yaj.II 135-36 - see report at p.979. It is to be noted that the pundits of the district Court had rightly preferred the husband's uncle's son but the Sudder Court Pundits held otherwise. The confusion was caused by inclusion of some of the district of the Mithila school into the province of Bengal as it stood then.
- (3) (1885)12 Cal.348. The case was followed in Kamla Prasad v. Murli Manohar A.I.R.1934 Pat.398 wherein Dhavle J. considered the Kṛitya-kalpataru, Vivādachandra, and the latest authority of the Mithila school, namely, the Dvaitapariśiṣṭa of Keṣava Miśra or its later version the Suśiṣṭapariśiṣṭa by Kalyāṇa Miśra. Dhavle J. added that the later two authorities also do not refer to the text of Bṛihaspati and that the intermediate treatises simply paraphrase the text. He further observed that 'In this respect the Mithila school is much weaker than the Mayukha vis-a-vis the Mitaksara...' - See A.I.R.1934 Pat.398 at 409 (see notes to p.). In Mohun Pershad v. Kishen Kishore (1893) 5 Cal.344 their Lordships of the Calcutta High Court approving the argument of Golapchander Sarkar and following the opinion of Banerjee and the Vyavasthā of the Sudder Pundits in Sree Narayan Rai's case wrongly distinguished Bacha Jha's case as determining preference only between the heirs both of whom come under Bṛihaspati's text and held that the husband's sister's son is to be preferred to his paternal great-grandfather's grandson. But in Hamla Prasad's case (A.I.R.1934 Par.398 at 405) Dhavle J. pointed out that the Vyavasthā included - and that too in the beginning - even the woman's own brother and sister in the heirs given by Bṛihaspati and held that the Mitākṣarā order alone is to be followed.

authority of the Mithila school - and the Vivādachintāmaṇi; that the order of succession of these secondary sons inter se has not been given in the Ratnākara, Mayūkha or Smṛitichandrikā etc. and so applying the general rule of succession stated in the Mitākṣarā they held that according to the Mithila school the husband's brother's son succeeds in preference to the woman's own sister's son. In Gojabai v. Shrimant Shahajirao⁽¹⁾ Telang J. laid down the principles of the identity of husband and wife⁽²⁾ and of construing the Mitākṣarā in harmony with the Mayūkha;⁽³⁾ but holding that the Mayūkha is self-contradictory and anomalous as regards Bṛihaspati's text,⁽⁵⁾ he held that in the Bombay school where Mitākṣarā is predominant the text of Bṛihaspati is not to be taken into consideration at all. In Bai Kesserbai v. Hunsraj⁽⁵⁾ their Lordships of the P.C. approved all of the above points made out by Telang J. in Gojabai's case and relied solely upon the Mitākṣarā to determine the succession according to the school of law applicable even to that part of Bombay where the Mayūkha is predominant. In Jagannath v. Ranjit⁽⁶⁾ their Lordships

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- (1) (1892)17 Bom.114 (Grandson of a co-widow preferred to the husband's brother's son).
 - (2) 17 Bom.114 at 118-19 and at 122, approved in 30 Bom.P.C.431 supra at p.444.
 - (3) 17 Bom.114 at 118 approved in 30 Bom.431 P.C. at 442.
 - (4) 17 Bom.114 at 123 & 126 quoted and approved in 30 Bom.431 at 448-49.
 - (5) (1906)30 Bom.431 P.C. (co-wife succeeds in preference to the husband's brother).
 - (6) (1897)25 Ca.345 at 366-68. It was held that the Vīramitrodaya is to be referred to only where there is a doubt about the meaning of the Mitākṣarā but not "for the purpose of creating a doubt" - Report at 368 followed in Dwarkanath v. Saratchandra (1911)39 Cal.319 at 339. But in their zest to substantiate this stand their Lordships observed that in Thakore Dehee v. Rai Baluk Ram (1866)11 M.I.A.139. Katyagana's text as cited in the Vi.Mi.was referred to only because the Mitākṣarā was 'silent or

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of the Calcutta High Court rejected the argument put forward by Golapchandra Sarkar and, rejecting the authority of the Vīramitrodaya as against that of the Mitākṣara, held that to determine the law of the Benares school in this respect the Mitākṣarā is to be followed. The position, namely, that according to all the Mitākṣarā sub-schools the simple order of succession stated in the Mitākṣarā is applicable to strīdhana of a childless woman, has never been deviated from since then.⁽¹⁾

The line of succession to strīdhana of a childless woman married in an unapproved form is very similar to the line prescribed for succession to maiden's property. In the former the heirs are the mother, father and their nearest sapinḍas,⁽²⁾ whereas in the latter case the heirs are uterine brother, father, mother and then the nearest sapinḍas of the father and mother.⁽³⁾ For the purpose of determining the father's nearest sapinḍas the case of a woman married in one of the 'blamed rites' is similar to that of a maiden since in the case of the former there is no 'kanyādāna' or giving away of the bride;⁽⁴⁾ so the case-law for both the lines of succession is the same.⁽⁵⁾

at least doubtful' - Report at - 368. The statement obviously proceeds from a mistaken notion about the text of the Mitākṣarā see supra (chapter II).

- (1) Ganeshi Lal v. Ajudhia (1906)28 All.345 (husband's sister's son preferred to woman's own sister's son).
- (2) See Mit., Vi.Mi. supra.
- (3) See Mit.on Yaj.II 145 quoting Baudhāyana and the addition of Vi.Mi.552 to the same.
- (4) Bhagwan v. Warubai (1908)32 Bom.300.
- (5) Janglubai v. Jetha Appaji (1908)32 Bom.409, Dwarkanath v. Sarat Chandra (1911)39 Cal.319 at 333, Raghava Surendra v. Lachmi Koer A.I.R.1939 Pat.636.

It has been held that the words 'their nearest sapinḍas' denote only the nearest sapinḍas of the father, as the sapinḍas of the father are also the sapinḍas of the mother,⁽¹⁾ and that these sapinḍas include both sagotra and bhinna-gotra sapinḍas of the father.⁽²⁾ As in the case of the husband's nearest sapinḍas in the case of father's sapinḍas also the order laid down by Yājñavalkya and accepted by Kamalākara⁽³⁾ is to be followed; the result is that the property devolves like a male's property and in default of the father himself his sapinḍas would take it in the same way in which they would have taken his property.⁽⁴⁾

Succession to a childless woman's property thus assumes the shape of succession to a male's property and almost all the rules that are applicable to the succession to a male's property according to the particular school are also applicable here. Accordingly it has been held that the principle of preferring a sapinḍas of full

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- (1) Janglabai v. Jetha Appaji (1908)32 Bom.409, Dwarkanath v. Saratchandra (1911)39 Cal.319 at 337-39 (Sarkar 4th edi.460, Banerjee 2nd edi.424 in favour of order according to Yaj.II. 135-36 quoted for support), Kamala v. Bhagirthi 38 Mad.45, Jatiram v. Bai Diwali A.I.R.1939 Bom.154 (Kane Vya.Ma.p.299).
- (2) Dwarkanath v. Sarat Chandra (1911)39 Cal.319 at p.329-30 (Banerjee 2nd edi.260), Raghava Surendra v. Balai Lachmi Koer A.I.R.1939 Pat.636 at 651, Meghaji v. Anant A.I.R.1948 Bom.396.
- (3) See supra.
- (4) Dwarkanath v. Sarat Chandra at 337-39 (Sarkar 9th edi.460, Banerjee 2nd edi.424), also at 332 (Kamalākara is to be preferred to W.& B. in Benares according to Banerjee 2nd edi.p. 363), Jotiram v. Bai Diwali A.I.R.1939 Bom.154, Raghava Surendra v. Lachmi Koer A.I.R.1939 Pat.636 at 653-54 (Kamalākara preferred to W.B. in Benares, Vi.Cha.II 539 Banerjee edi.4 p.383, 389, Golapchandra 6th edi.p.730-31 etc. referred to), Chhaterpati v. Lachmidhar (1940)73 I.A.231 confirming the decision in Raghava Surendra v. Lachmi Hoer supra, Meghaji v. Annant A.I.R. 1948 Bom.396. at 398, Tukaram v. Narayan 36 Bom.339 F.B.

blood to a sapinda of half-blood is limited to heirs who are equal in degree of propinquity but that a nearer person of half-blood excludes the remoter one of full blood.⁽¹⁾ Similarly a remoter agnate is to be preferred to a nearer cognate.⁽²⁾ Accordingly the heirs in default of the father would be brother, brother's son, brother's grandson, sister, sister's son etc. and the step-relations would succeed immediately after the whole blood relation of their own class.

It has accordingly been held that the father's sister is preferred to the maternal grandfather of the deceased,⁽³⁾ sister or sister's son to father's brother's son,⁽⁴⁾ step-mother to mother's sister,⁽⁵⁾ father's brother's son to father's sister,⁽⁶⁾ brother's

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- (1) *Khushal v. Sheoshankar* A.I.R.1949 All.672 (though this case relates to the husband's sapindas it is equally applicable to the father's sapindas as well). *Shakuntalabai v. Court of Wards* I.L.R.1942 Nag.629 (woman's full sister preferred to woman's half-sister in Bombay).
- (2) *Kumar Raghava Surendra v. Lachmi Koer* A.I.R.1939 Pat.636, *Chatterpati v. Lachmidhas* (1946)73 A.I. 231, *Kuppuswami v. Manicksari* A.I.R.195 Mad.196. But see *Dwarkanath v. Sarat Chandar* (1911)39 Cal.at 329-30 wherein it is observed that this principle is not applicable to strīdhana succession wherein cognates are in many cases preferred to agnates. See also *Naja Pillai v. Sivabayyathachi* (1910)36 Mad.116. In the former case the observations were obiter whereas in the latter case the judges seems to have wrongly considered a step-daughter to be a bhinna-gotra sapinda. See also the argumant of P.R.Das the coulsel in A.I.R.1939 Pat.636 at p.655 onwards: *Kamalākara* in the end prefers heirs - some of whom are cognates - on the basis of religious efficacy. (This is not true. See *Vi.Ta.* 468 wherein the whole passage is quoted as being the interpretation of *Jīmūta*).
- (3) *Jagulubai v. Jatha Appaji* (1908)32 Bom.409. It was rightly held that though the mother is preferred to the father in the *Mitākṣarā* this preference is purely personal and that it cannot be extended to the effect of preferring matribandhus to pitribandhus.
- (4) *Dwarkantha v. Sarat Chandar* (1911)39 Cal.319.
- (5) *Kamala v. Bhagirthi* (1912)38 Mad.45.
- (6) *Sundaram Pillai v. Ramaswami* (1920)43 Mad.32.

son to a sister,⁽¹⁾ step-brother to a sister,⁽²⁾ and sister to sister's son.⁽³⁾ According to the Bombay school where the Mayūkha is predominant the father's brother and the father's brother's son inherit together.⁽⁴⁾ It need not be added that in the same school certain additional female heirs of the father of the deceased would also be entitled to inherit her strīdhana.⁽⁵⁾

The decisions in all the above cases concerning the husband's or the father's sapinḍas as the case may be proceed on the assumption that the strīdhana of a childless woman, devolves exactly like male's property according to the text of Yājñavalkya which is accepted by Kamalākara. The Bombay High Court indeed lays down specifically that this rule of 'merger' prevails against the normal rule of propinquity to the deceased.⁽⁶⁾ Almost all the modern text-books state that in default of the husband or the father as the case may be the husband's or father's nearest sapinḍas respectively succeed to the strīdhana of a childless woman in the same order in which they would have succeeded to the property of the husband or the

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- (1) Jobiram v. Bai Diwali A.I.R.1939 Bom.154.
 - (2) Gopibai v. Chuhermal A.I.R.1939 Sind 234.
 - (3) Raja Grammani v. Ammani Ammal (1906)29 Mad.358.
 - (4) Maghaji v. Anant A.I.R.1948 Bom.369. following the ratio of Keserlal v. Jagubhai A.I.R.1925 Bom.406 wherein a similar decision has been given in respect of husband's brother and husband's brother's son.
 - (5) Tukaram v. Narayan (1911)36 Bom.339 F.B. (father's sister succeeds in preference to father's gotrajasapinḍas five or six degrees removed.)
 - (6) Meghaji v. Anant A.I.R.1948 Bom.369 at 398. In Keserlal v. Jagubhai wherein the husband's brother and the husband's brother's son were held to be entitled to succeed equally as husband's sapinḍas it was observed that succession to the property of the deceased went 'to his and not her heirs' - at p.410.

father himself.⁽¹⁾

The position, however, does not appear to be entirely correct from the point of view of either the Śāstric⁽²⁾ law or the case-law. In Gangadhar v. Hiralal⁽³⁾ there was a competition between a son born to a co-wife and son adopted by the husband in conjunction with another co-wife of the deceased proposita. Now if the succession were to descend exactly as in the case of male's property the adopted step-son could have taken only a one-fourth share in competition with the natural born step-son, for the rule of Vasiṣṭha⁽⁴⁾ that an adopted son takes one-fourth in competition with an aurasa son would have come into operation. But all the judges in that case unanimously held that the text of Vasiṣṭha is to be treated only as an exception to the general well-established rule that an adopted son is equal to a natural-born son in all respects, and that an application of this exception which must be confined to itself, cannot be allowed a further extension by atideśa.⁽⁵⁾

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- (1) Mayne 11th edi.746, Sarkar H.L.6th edi.p.732, Trevelyan H.L. 3rd edi.pp.489,492,493, Gupte H.L.p.492 & 593. For cases from the Native States see Naji v. Kaliani (1889)12 Mys.L.R.64 (the grandson of the brother of the grandfather is preferred to brother's daughter; Mallamma v. Thimamma (1899)4 Mys.C.C.R.130 (sister preferred to sister's son); Ernagappa v. Halappa (1910) 16 M.C.C.R.99.
- (2) See supra Vi.Mi., Dā.Ta.etc giving the successive order as stepson, stepson's son etc.
- (3) (1916)43 Cal.944.
- (4) See 43 Cal.944 at 969 where the text of Vasiṣṭha together with the extension of its application given in Dā.Mi.X.1 and Dā.Cha. II.11 and II.17-18 have been noted. It is also remarked that the atideśa in Dā.Mi.II is rather forced and erroneous. The rule applies to the father's property.
- (5) See 43 Cal.944 at 956 per Sanderson J., at pp.959-60 per Woodroffe J., and at pp.970-72 per Mookerjee J. In support of the principle that an exception should not be extended by atideśa Mookerjee J. quoted Ebbs v. Boulnois 1875 L.R.10 Ch.App.479,

Referring to the text of the Mitākṣarā which lays down the rule that strīdhana goes to the husband's nearest sapinḍas Mookerjee J. remarked: "In my opinion, this does not show that the property descends as if it belonged to the husband; the only effect of the two paragraphs is to determine the heir to the woman by application of the test of sapinḍaship with her husband.⁽¹⁾" Their Lordships rightly refused to apply to strīdhana succession the text of Vasiṣṭha and held that both the sons succeed equally to the strīdhana of their step-mother and adoptive step-mother respectively.

Further, in the recent case of Krishnaswami v. Sankili⁽²⁾ the question before the Madras High Court was whether the step-grandsons of the deceased proposita inherited simultaneously with the sons of another step-grandson of the proposita. If the succession were to be treated as being on all fours with succession to a male's property there could be no doubt that on the principle of representation both kinds of heirs would have succeeded simultaneously to the strīdhana of the proposita as constituting their coparcenary property. But

484 and the Mitākṣarā Moghe's edi.at p.292 which is Mit.on Yaj. III.28-29 (Nij.edi.p.321): "Bādhasya Chānupapattinibandhanat-vāt yāvatyabādhite 'nupapattipraśamo na bhavati tāvadbādhanīyam" Incidentally it must be remarked that the method of giving reference to a portion of a commentary by giving the page-number of a particular edition is highly inadvisable. If the particular edition is not at hand the reader is at a loss to know how to trace the reference. The best way is to quote the number of the portion of the original work upon which the particular comments are made. Moghe's edition is not available in London and tracing this quotation which lies buried in the āśauchaprakaraṇa of the Mitākṣarā was a stupendous task. The sentence is incorrectly quoted in the report and there is a misprint in Nir.Edition also. Read 'bādhasya' instead of 'Bādhasyam'.

(1) 43 Cal.944 at 972 (Mit.Trans.II.11.11 referred to).

(2) I.L.R.1956 Mad.324.

their Lordships of the Madras High Court rightly held that the doctrine of representation is based upon spiritual benefit,⁽¹⁾ that the principle of spiritual benefit has no application to strīdhana succession⁽²⁾ and that the step-grandsons excluded the step-great-grandsons.⁽³⁾ Ayyangar J. further observed that one cannot lose sight of the fact that the "propositus" is really the woman, that it is to her that succession is to be traced and that the kinsman of the husband inherit her property because they are also her kinsmen.

As the ratio of this case, namely, that the strīdhana of a childless woman does not exactly devolve like male's property⁽⁴⁾

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- (1) Report at p.329.
 - (2) The decision given by Sir Basil Scott C.J. in Bai Raman v. Jugjivandas (1917)41 Bom.618 at 624 was relied upon. - See the Report at p.330. See also Karuppai v. Sankaranarayanan (1903)27 Mad.300 F.B. at 308 referred to supra and at Report p.328. Both these cases refer to woman's own sons: it was held that the grandsons etc. do not succeed in presense of sons. The former pertained to non-technical strīdhana under the Mayūkha. See infra. It was held that propinquity was the only test (Manu IX.187 quoted). See also the same rule stated in Gopibai Mulchand v. Chuhermal Mulchand A.I.R.1939 Sind 234 (relying upon Mulla H.L.8th edi.p.139 to the same effect).
 - (3) Reliance was based upon Bhimacharya v. Ramcharya (1909)33 Bom. 452 at p.459 wherein Chandavarkar J. observed that step-son, step-grandson etc. 'become heirs in their order'. - See Report at p.330. It was stated that the order given in Mayne's 11th. edi.para 624 and in Mulla H.L. 11th edi.para 147 is correct. There is no explanation, however, in these and other text-books why the step-son should exclude step-grandsons. But the rule of the śāstra as stated in Vi.Mi., Vi.Ta. etc. is clear. See supra.
 - (4) This was exactly the stand taken by the two eminent lawyers Dr.M.R.Jayakar and P.R.Das in Bai Raman v. Jugjivandas (1917) 41 Bom.618 and Raghava Surendra v. Lachmi Koer (1939)8 Pat.590 respectively. But the reasoning adopted by each is different: the former based his view on the principle of propinquity whereas the latter resorted to the principles of both propinquity and spiritual efficacy. The former was successful but the latter was not. It is surprising that nearly 30 years after he had taken the above stand in Bai Raman's case the same Dr.M.R.Jayakar as a member of the P.C. refused to accept the argument of P.R.

but proceeds on the principle of propinquity, is based upon the decision and the reasoning of their Lordships of the Bombay High Court, the decisions of the same High Court in the two Mayukha⁽¹⁾ cases in which brother and brother's son of the husband or of the father were held to be equally entitled to the strīdhana of the proposita, appear to have been incorrectly decided.

According to the Hindu Law of Inheritance (Amendment) Act II of 1929 the son's daughter, daughter's daughter, sister and sister's son succeed in that order to a male's estate and this group of heirs comes after the paternal grandfather and before the paternal uncle. It is important to ascertain whether the Act affects that part of the line of succession to strīdhana which consists of husband's or father's sapinḍas as the case may be. It had been uniformly approved that the Act does apply to a case where the male propositus has died before the Act but succession to his property has opened upon the death of a female owner having a limited estate in the same and dying after the commencement of the Act.⁽²⁾ In Charjo v. Dinanath⁽³⁾ Tekchand J. applied this analogy to the strīdhana of a woman who had died after the commencement of the Act but whose husband had died before the commencement of the Act and held that

Das in Chatterpati v. Lachmi Koer (1946)73 I.A.231 supra and held that the succession devolves exactly like a male's property and that a remoter agnate is to be preferred to nearer cognate.

- (1) Keserlal v. Jagubhai A.I.R.1925 Bom.406, Meghaji v. Anant A.I.R.1948 Bom.368 - see supra.
- (2) See the cases referred to in Mayne 11th.edi.p.78.
- (3) A.I.R.1937 Lah.196. See also Keher Singh v. Attar Singh A.I.R. 1944 Lah.442 wherein the position is presumed to be a settled one on the authority of Mulla 9th edi.p.43.

her step-son's daughter was to be preferred to the husband's collaterals.⁽¹⁾ It was held in the Bombay High Court that on account of the new rule introduced by this Act a maiden's father's sister's son is preferred to the father's collaterals.⁽²⁾ But subsection two of the first section of this Act expressly limits the application of this Act to a male's property and hence it was rightly held in the Madras, Nagpur and Patna High Courts that succession to strīdhana is to be determined without the help of this Act.⁽³⁾ The controversy is set at rest since the Supreme Court in Annagonda v. Court of Wards⁽⁴⁾ upheld the view of the Madras High Court and overruled all the previous decisions to the contrary.

Broadly speaking, at present only the Brāhma and Āsura forms of marriage are practiced in India.⁽⁵⁾ For the purpose of determining the line of succession to strīdhana the deceased woman

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- (1) See Report at p.200 wherein it was remarked: "To ascertain as to who the heirs of the husband are we must, ex necessitate rei refer to the law governing succession to the property of the husband in force at the time when the succession opened out." But against this remark see Mayne edi.10th p.84 approved in Mahalakshamma v. Suryanarayana I.L.R.1947 Mad.23 at 27.
- (2) Shamrao v. Raghunandan I.L.R.1939 Bom.228, Raghunandan v. Keshavrao A.I.R.1939 Bom.194. The argument of Sir Chimanlal Setalwad was flatly rejected.
- (3) Talukraj Kuer v. Bacha Kuer I.L.R.(1947)26 Par.150, Mahalakshamma v. Suryanarayana I.L.R.1947 Mad.23, Shakuntlabai v. Court of Wards I.L.R.1942 Nag.629. Kuppuswami v. Minaksari A.I.R.1950 Mad.196. See also P.H.Banatvala: Succession to the stridhan property of a female under Hindu law and effect of the Hindu Law Inheritance (Amendment) Act II of 1929, 51 Bom.L.R.57.
- (4) A.I.R.1952 s.c.60.
- (5) See Banerjee.

is presumed to have been married in the brāhma form.⁽¹⁾ The money which is received by the parents etc. as the bride-price forms the essential feature of the Āsura form.⁽²⁾ Even if the bride-price is received by the maternal relations of the deceased woman, the form of the marriage would nevertheless be considered as Āsura if actually such maternal relative made the gift of the bride.⁽³⁾ Once the bride-price is accepted, performance of brāhma rites does not transform an Āsura form into a Brāhma one.⁽⁴⁾

Although the Āsura form is quite prevalent amongst the Tamils and especially amongst the śūdras like Baliijas or Kuverais⁽⁵⁾

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- (1) Gojabai v. Shahajirao (1893)17 Bom.114 at 117, Jagannath v. Ranjit (1897)25 Cal.345 at 365. Authikesavulu v. Ramanujam (1909)32 Mad.512 at 525. In Authikesavulu's case the parties had not undergone even saptapadī or vivāhahoma. But see Moosa Haji v. Haji Abdul (1905)30 Bom.197: the non-performance of saptapadī or vivāhahoma may invalidate a marriage but does not determine the form - cited in 32 Mad.515 supra at 519-20. For this presumption of the Brāhma form see also Ambalavanan v. Thankavadiwoo (1885)7 T.L.R.80; Ponmamma v. Nallakannu (1889) 8 T.L.R.167.
- (2) Chunilal v. Surajram (1909)33 Bom.433. Chandavarkar J. has excellently discussed various Śāstric texts in this case: Saṃskāra Mayūkha (Amarapurker's edi.p.45) quoted: "Evañcha ātmārthaṃ dhanagrahaṇe tu doṣaḥ kanyārthe tu na doṣaḥ." See also Ambalavahan v. Thankavadiwoo supra.
- (3) 33 Bom.433 supra. It was held that the word 'ādi' in "pitṛād-irakṣitāyāḥ kanyāya eva danopadeśāt' in the Mitākṣarā on Yaj.II 290 denoted all relations ajusdem generis. Reliance was placed upon the maxim of nyāyasamatva or samānanyāyatva stated by Uśanas who is quoted in the Mitākṣarā (Moghe's edi.p.397 i.e. Mit.on Yaj.III 265 Nirṇayasāgara edi.p.429):
Bahūnāmekadharmāṇām ekasyāpi yaduchyate/
Sarveṣām tadbhavētkāryaṃ ekarūpā hi te smṛitāḥ//.
The same maxim is referred to by the same judge in Bai Parson v. Bai Somli (1912)36 Bom.424 supra. This is in fact the principle of atideśa.
- (4) 33 Bom.433 supra. But see Subramonia v. Krishna T.L.R.(1947) 523 wherein it was held that where a marriage is celebrated in a Brāhma form payment of money to the bride's father does not transform it into an Āsura one.
- (5) See 32 Mad.515 supra at p.516 wherein Leon Sorg is quoted:

(continued)

the mere payment of a trifling sum known as payidimudupu does not turn the form of marriage into an Āsura one especially if the mantras peculiar to the brāhma form are uttered.⁽¹⁾ But in Bombay where 'Dej' is paid, the marriage is considered to have taken place in the āsura form.⁽²⁾ In Punjab a woman who is called 'Madkhula' is nothing more than a concubine, and marriage celebrated according to 'chadar andazi' is treated as one celebrated in an unapproved form.⁽³⁾ According to a custom prevailing in Manipur marriage between a divorced wife and a remote relative of her husband being valid the marriage is presumed to be of an approved kind though the wife is not able to participate with such second husband in certain social functions.⁽⁴⁾ It has been held that there is no provision in the Punjab customary law for succession to strīdhana and that the lacuna in the customary law is to be filled in by the application of the

("marriage by purchase is common amongst the Tamils with the formula 'The money is for you, the girl is for me'". He includes Kaverais amongst the people who practice the same form. See also Strange H.L.I.43 referred to in the same case.

(1) Authikesavulu's case.

(2) Govind Ramji v. Savitri (1918)43 Bom.173 (therefore in preference to the husband).

(3) Gurdial Singh v. Bhagwan Devi (1927)8 Lah.366.

(4) Payam Liklai Singh v. Mairanthem Maipak Singh A.I.R.1956 Mani.18 (husband preferable heir, Mulla approved).

rules of the ordinary Hindu law.⁽¹⁾ Accordingly even in Punjab the property of a childless Hindu woman would devolve upon her husband and his nearest sapinḍas or her father and his nearest sapinḍas as the case may be.

Whether allowed by the Śāstra or not remarriage is quite common amongst the lower castes in certain parts of India and it has been held that in determining the line of succession to strīdhana the form of remarriage is as important as the form of the first marriage so that if a bride-price is given in the second marriage the property of the proposita would devolve upon her father and his nearest sapinḍas.⁽²⁾ If this is so a very intricate situation can be

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- (1) *Gurdial Singh v. Bhagwan Devi* (1927) 8 Lah.366 followed in *Kehar Singh v. Attar Singh* A.I.R.1944 Lah.442. In 8 Lah.366 at 372 Tekchand J. referred to Rattigan's Digest p.271 giving the line of heirs to strīdhana but observed: "Custom is a matter of proof and not of conclusions based upon a priori reasoning or deductions drawn from a comparative study of the laws of distribution prevailing among the primitive societies. The learned author of the digest does not base his remark on any entry in the rivaz-i-am of any district in the Punjab or any decided case, reported or unreported. I must, therefore, respectfully decline to follow it". Unlike the learned judges in *Mayna Bae's case* Tekchand J. wisely refrained from bringing his personal knowledge into the picture. The decision to follow the ordinary Hindu law in such case was based upon *Daya Ram v. Sohail Singh* (1906) 110 P.R.(F.B.)372. Another point decided in *Gurdial's case* was that a woman from Oudh who was a kept mistress of a Punjabi or alternatively was married to him in an unapproved form was not governed by the Punjab customary law but by the ordinary Hindu law.
- (2) *Jotiram v. Bai Diwali* A.I.R.1939 Bom.154. The defendant in this case tried to distinguish between palla and bride-price, for the purpose of determining the form of marriage. There could be some truth in the argument; for whereas śulka goes to uterine brother, mother and father, in a very old case in Bombay, namely, *Manohurdas v. Lukmeedas* (1923) Borr.II.69 the court implicitly admitted, upon the evidence of witness, that upon the death of the bride after marriage the 'pulla' is to be returned to the husband's family. For pulla see supra p.263 and infra

imagined, though it has never confronted the Courts so far: if a woman's first marriage has been celebrated in approved form and the second one in an unapproved form how will her property devolve? Unquestionably she becomes a gotraja sapinda of her first husband but the second marriage having been celebrated in an unapproved form she does not acquire the gotra of her second husband; however, the property does not devolve upon her father and his heirs, for the woman cannot be held to have been made bereft of her first husband's gotra either by his death or her second marriage. Her stridhana in such a strange case like this would devolve upon the heirs of her first husband. This point has not been brought to the notice of their Lordships in the above-mentioned case and they probably proceeded on the presumption that both the marriages must have had been celebrated in an unapproved form. But according to the established view the first marriage, in the absence of any evidence to the contrary, ought to have been presumed to have had been celebrated in an approved form.

In Kanakammal v. Ananthamathi⁽¹⁾ their Lordships of the Madras High Court held that stridhana of a woman married in an

(1) (1912)37 Mad.293, followed in Ganpat Rama v. Secretary of State for India (1920)45 Bom.1106, Motichund v. Kunvar Kalika (1926)48 All.663, Vithal Tukaram v. Balu Bapu (1935)60 Bom.671, Asu Tala v. Sha Kanji A.I.R.1952 Kutch 69. It is interesting to note that judicial notice of jus tertii was taken in Kanakammal's case although the defendant had not pleaded the same. If the same procedure had been adopted by their Lordships of the Privy Council in Sheo Shankar v. Debi Sahai (supra) it would have spared the time and trouble of their Lordships of the various High Courts who had to interpret the ratio of the decision in Sheo Shankar's case. See supra pp.419-20.

approved form devolves, in default of her husband and his sapinda, upon her blood-relations and they succeed in preference to the Crown. Referring to the doctrine of escheat to the Crown their Lordships observed: "This is a doctrine contrary to the general principles of Hindu law of inheritance, and one to which we should be loth to give effect. It is unsupported by any text to which our attention had been drawn."⁽¹⁾ No reference to Sanskrit texts was in fact made in this case. It must be said that the doctrine of escheat has been admitted in Hindu law since the days of Kauṭilya.⁽²⁾ But it is also true that the property of a brahmin and the six-fold strīdhana of a woman are expressly excluded from the operation of this doctrine.⁽³⁾

The decision in Kanakammal's case seems to have settled the law all

(1) 37 Mad.293 at 295. For a very old notion to the same effect entertained by their Lordships of the P.C. see *Giridharilal v. Government of Bengal* (1868) 1 B.L.R.45 at 49 : "It is impossible to read the second chapter of the Mitakshara without remarking the extreme jealousy with which the Hindu law regarded the right of the king to take on failure of heirs. The 7th section refuses altogether to recognise that right where the property was that of a brahman."

(2) Kau.3.5 : "Adāyādakam rājā haret." See also Devala cited in Vi. Ra.597, Vi.Chi.155, Vi.Ta.410 etc. For other quotations see Vi.Chi. 155-56 but therein 'technical strīdhana like adhyagni etc.' is expressly excluded from escheat. For escheat see also Mit. on Yaj.II.135 wherein Manu IX.189 is referred to; Kūlluks on Manu IX.189; Na.Smr. 16.51 and Na.Sam.14.48; Saṅgrahakāra quoted in Smr.Cha.699 and Sa. Vi.420.

(3) Paithīnasi quoted in Apa. on yaj.II.136 and Śaṅkha quoted in Vi.Ra.598 and Vi.Chi.156.

over India and all the text-book writers appear to be in full support of the same.⁽¹⁾ It can also be supported on the grounds of justice, equity and good conscience.

Messrs. West and Bühler opine that in such case the father's sapinḍas should be considered as being entitled to succeed in the same order in which they would have succeeded if she had been married in an unapproved form or had not been married at all.⁽²⁾ But in Vithal Tukaram v. Balu Bapu,⁽³⁾ Divatia J. held that in default of the husband and his sapinḍas the strīdhana of a woman married in an approved form is taken equally by her brother and sister. As the decision is totally inconsistent with the Śāstra as well as case-law and as it was given solely at the instance of such a leading scholar as Dr.P.V.Kane it needs special scrutiny. The points cleverly but misleadingly put forward by Dr.Kane and accepted by the learned judge are as follows:-

(1) That after an approved form of marriage the bride goes into the gotra of her husband's family and that the relations in her father's family can be treated only as bhinna-gotra sapinḍas or bandhus.

(1) See infra p.467 note no.2.

(2) W.& B. 4th ed.p.508 : " If, therefore, the right of the widow's own blood-relations revives on the failure of the husband's sapindas, it seems natural to allow them to succeed in the same order as they would have done before her marriage, and to place the mother first, next the father, after him the brother and the rest of the sapindas, according to their nearness of relationship". - quoted and disapproved in Vithal Tukaram v. Balu Bapu (1935) 60 bom.671 at 676.

(3) See above note no.2.

(2) That the analogy of succession to maiden's property cannot be applied to such a case since a maiden or a woman married in an unapproved form have the gotra of their father.

(3) That according to Rajeppa v. Gangappa⁽¹⁾ bandhus who are related in equal degrees take equally and no preference is given to male over female.

(4) That according to this principle the brother and sister of such a woman would inherit her property equally as her bandhus or bhinna-gotra sapinda.

The whole argument is full of fallacies and strikes at the root of some of the basic principles laid down by the Śāstric and judicial law. In the first place it is incorrect to say that by marriage a daughter ceases to be a gotraja sapinda of her father or his family.⁽²⁾ Vijñāneśvara no doubt uses the words "samānagotra sapinda" for the words "gotraja sapinda." But the illustration which he gives of the former leaves no doubt that these persons are born in the family of the propositus.⁽³⁾ Moreover according to him the word gotra denotes a continuity of line by birth and name.⁽⁴⁾ The words "gotraja sapinda", therefore, are used in contradistinction from the words "bhinnagotra sapinda". Thus a bhinnagotra sapinda of A is a person who is A's blood-relation but not born in A's gotra. There can be no doubt that a woman married in one of the approved

(1) (1922)47 Bom.48.

(2) See Mayne's opinion (11th edi.p.610) approved in Shakuntalabai v. Court of Wards I.L.R.1942 Nag.629. But as against this view see Mayne 11th edi.pp.611-14.

(3) Mit.on Yaj.22.135-36 Nir.Edi.223.

(4) See Mit.on Yaj.1.53 p.14: "Gotraṃ Vaṃśaparamparāprasiddham" and Mit.on Yaj.2.135-36 p.223: "Janmanāmoḥ smṛitereke tatparam gotra uchyate."

forms passes into her husband's gotra and by fiction becomes his gotraja sapinḍa. But this does not mean that she ceases to be a gotraja sapinḍa of her father's family. According to Dr.Kane's view she would cease to be a gotraja sapinḍa of her father and mother also. But such a case does not appear to have been anticipated by any of the commentators and nobody has ventured to say so far that father and mother can be included in the list of bandhus. Moreover if it is contended that according to the established view of the case-law there is a complete fusion of the wife with her husband in an approved form of marriage then it is evident that a wife can have no sapinḍas in her father's family at all; for her husband's gotraja sapinḍas will be her gotraja sapinḍas and it is his bandhus who will be her bandhus. She will have no bandhus of her own at all; for once it is admitted that she becomes a gotraja sapinḍa of her husband and completely merges into him, it follows that only those persons who are blood-relations of her husband's family but who are not born in that family can be her bandhus.

To avoid all this confusion Nīlananṭha rightly points out that in succession to a male's property a sister succeeds as a gotraja sapinḍa though she may not be called as a person of the same gotra. ⁽¹⁾ Taking into consideration the established manner of interpreting the Mitākṣarā and the Mayūkha in harmony ⁽²⁾ there is no reason why this reasoning should not be followed in all cases at least of the Bombay School, and accordingly all persons who are born

(1) Vya.Ma.143: "Tasyā api bhrātrigotrotpannatvena gotrajatvā-viśeṣāchcha. Sagotratā param nāsti."

(2) See supra pp. 443, 447.

in a married woman's father's gotra are her gotraja sapin̄das. As amongst gotraja sapin̄das the heirs mentioned in the compact series⁽¹⁾ of heirs supercede the heirs not mentioned in it; therefore the brother succeeds in preference to a sister.

Moreover in Rajeppa's case the competition was not between a male and a female bandhu; it was only held that bandhus related in equal degrees would succeed equally and that propinquity being the only test in Bombay Presidency the test of religious efficacy is not applicable. Even the ratio of this case cannot be stretched to its logical extent since in a later case of the Bombay School Kenchava v. Girimallappa⁽²⁾ their Lordships of the Privy Council held that amongst bandhus of the same class and removed equally from the propositus the male would exclude a female.

Thus it is clear that whether it is held that succession in such case devolves upon the woman's father's sapin̄das or her own bhinna-gotra sapin̄das the result would be the same, namely, a brother is preferred to a sister.⁽³⁾ It may be added that in a later case⁽⁴⁾ the Judicial Commissioner of Sind took a more attractive view of the problem. Observing that the property in such case devolved exactly

(1) Yaj.2.135.

(2) (1924)51 I.A. 368.

(3) For adverse but inadequate comments against the decision in Vithal's case see also Mayne p.746, Gupte p.593. Divatia J. gave out also an uncalled for obiter, namely, that the strīd-hana of a childless woman married in an approved form devolves, in default of her husband and his sapin̄das, upon her 'blood-relations' but that if she is married in an unapproved form 'the husband and his kinsmen do not come in the order of succession at all' - 60 Bom.671 at 676-77. But see the decision given by Sir John Beaumont C.J. in Chandulal's case - infra p.466.

(4) Asu Tala v. Sha Kanji A.I.R.1952 Kutch 69.

like male's property i.e. father's property, he held that a woman's sister's son is preferable to her paternal uncle.

In *Chundulal v. Bai Kashi*⁽¹⁾ Sir John Beaumont C.J. proceeded on the analogy furnished by *Kanakammal's* case and held that where a woman is married in an unapproved form her *strīdhana* devolves even upon her husband and her *sapiṇḍas* in preference to the Crown if she has no heirs left in her father's family. He depended upon the observations of Chandavarkar J. in *Janglubai's*⁽²⁾ case that even in an unapproved form of marriage the husband and wife become *sapiṇḍas* of each other. Observing that the list of heirs in the *Mitākṣarā* is not exhaustive as shown by Mitra Miśra and inferring thereby that even the list in the *Vīramitrodaya* is not exhaustive⁽³⁾ Sen J. in the same case further observed: "There is no text specifically excluding all heirs who are not mentioned, and there does not appear to be any intention that on failure of the heirs that are mentioned, the property is escheat to the Crown."⁽⁴⁾

It is submitted that the learned Chief Justice was quite correct in adopting this analogy but he proceeded on the incorrect statement of Chandavarkar J. in *Janglubai's* case. The husband and wife do not become *sapiṇḍas* of each other in unapproved form of marriage. The wife in such case can become the *sapiṇḍa* of her husband only after the *sapiṇḍīkaraṇa śrāddha* which is to be per-

(1) I.L.R.1939 Bom.97.

(2) (1908)32 Bom.409, see *supra* p.

(3) For the same point see *Giridharilal v. Govt.of Bengal* (1868) 1 B.L.R.(P.C.)45.

(4) I.L.R.1939 Bom.97 at 103.

formed after her death.⁽¹⁾ The reasoning of Sen J. is, moreover, nothing but a circular argument; to prove that the husband also is an heir in such cases he first assumes that the husband is an heir and then proceeds on a reasoning that all heirs who are not excluded by specific texts are not non-heirs.

However the alternative lines of husband and his heirs and of father and his heirs in approved and unapproved forms of marriage respectively have been accepted as settled law by all the text-book writers⁽²⁾ and this arrangement is perfectly justifiable according to the principle of justice, equity and good conscience which is applicable in Hindu law also.⁽³⁾

For succession to śulka Gautama gives the line of heirs as uterine brother, mother, and father.⁽⁴⁾ The order has been accepted by the majority of the commentators and text-book writers;⁽⁵⁾ so the other interpretation which prefers the mother to a uterine brother ought to be discarded in favour of the former one.⁽⁶⁾

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- (1) See Vi.Mi.pp.232-243 of Śuddhiprakāśa with a conclusion on p.243 "Evañcha ninditavivāhoḍhāyāḥ bhartrigotraprāptiḥ na pāṇigrah-anādinā, kintu sapinḍīkaraṇenaivetyuktaṁ bhavati." See Mit.on Yaj.II 254 where the author discusses 'sapinḍīkaraṇa' and says that in 'Asurādi' and 'putrikākaraṇa' only father's gotra is retained by a woman whereas in 'brāhmādi' there is an option.
- (2) Mayne 746-47; Gupte 581; Mulla (1946)140-41.
- (3) See introduction pp.18-19.
- (4) Gautama su. 28.22.
- (5) See Mayne 742; Bhattacharya 580; Gupte 581; Mulla 139.
- (6) For a discussion see supra. But see Sarkar H.L.6th edi.p.734 where the author prefers the mother in preference to a brother with an argument that this is a compromise between the older view that such property belonged to the parents themselves and the later view that such property becomes strīdhana. He also quotes the supposed authority of Jagannath v. Runjit (1897)25 Cal.354 for this proposition. But the case does not refer to śulka at all.

There has been no direct decision on succession to śulka. But in Bhola Ram v. Dhani Ram⁽¹⁾ it was observed that the essential character of śulka is that the progeny of the woman herself is excluded by the brother etc. Considering that the order for śulka has been so uniformly distinguished from the rest of strīdhana by authors of all the sub-schools, it appears to us that the Courts in India would not and should not venture to set aside the above-mentioned order of heirs.⁽²⁾ In conformity with the later policy of the Madras High Court⁽³⁾ there can be no doubt that in Madras the Mitākṣarā definition of śulka would prevail against the Smṛitichandrikā definition of the same so that śulka can mean bride-price only and nothing else.

Considering that the Āsura marriage is quite common in Bombay and Madras amongst the lower casts⁽⁴⁾ there appears to be no reason why this special order of succession should not be applied in cases - and these may be not be few - wherein the parents, out of affection for their daughter, hand over the money, in cash or in kind, to the bride herself.

The text of Baudhāyana which lays down the order of

(1) A.I.R.1929 All.25.

(2) But see Surayya v. Balakrishnayya (1941)I.M.L.J.496 at 499 wherein Mayne's opinion to the contrary was approved. For his view see Mayne iith.edi.p.743 wherein he says that śulka in the sense of bride-price ultimately given to the bride herself is obsolete, that if it is given to the parents it does not raise any question about strīdhana at all, that if it is paid to the bride as the price of ornaments etc. it need not have special order of succession.

(3) See supra p.409.

(4) See Leon Sorg quoted supra pp.457-8. See also cases of unapproved forms of marriage supra.

succession to a maiden's property has been accepted in toto by Chandavarkar J. in Janglubai's case.⁽¹⁾ It has never been disputed since then that the property of a maiden devolves upon the uterine brother, mother and father in that order. The heirs, in default of the father, to a maiden's property have already been discussed.⁽²⁾ However, the property given to the bride-to-be by the prospective bridegroom will be given back to him in case the bride dies before the marriage.⁽³⁾

The Mayūkha contains different rules for succession to Śtrīdhana of a woman having children.⁽⁴⁾ The anvādheya and bhart-ridatta strīdhana devolves upon the sons and daughters jointly with unmarried daughters taking a preference over the married daughters. It was held in Ashabai v. Haji Tyeb⁽⁵⁾ that the ornaments given to a woman after her marriage by her husband or his kindred devolve upon the sons and daughters in equal shares. No text-book or case was quoted in this case for support. But in Dayaldas v. Savitribai⁽⁶⁾

(1) Janglubai v. Jetha Appaji (1908)32 Bom.409.

(2) See supra p.448 onwards.

(3) Yaj.2.146 supra.

(4) Supra pp.352-53.

(5) (1882)9 Bom.115 followed in Sitabai v. Wasantarao 3 Bom.L.R. 201, Dayaldas v. Savitribai (1909)34 Bom.385. The report of Sitabai's case was not available in London but the case has been mentioned in Dayaldas's case.

(6) 34 Bom.385 supra. Reliance was placed on W. & B.3rd edi.p.145, Banerji 2nd edi.p.371. Bhattacharya 2nd edi.p.583, Ghose H.L. 2nd edi.p.281, Mayne 7th edi.p.898. The counsel for the respondent in this case raised two interesting points, namely, that Nīlakaṇṭha in this matter quotes the Mitākṣarā view and then introduces the other view with the words 'pare tu' and that according to Vasudeo v. Venkatesh (1873)10 Bom.H.C.R.139 and Kṛishnaji v. Pandurang (1875)12 Bom.H.C.R.65 when Nīlakaṇṭha mentions two views in this way without stating which is his own the Mitākṣarā view is to be followed. But it was held that the words 'pare tu', as shown by their use in Nāgojībha-

Chandavarkar J. accepted the above-mentioned rule as being the law of the Mayūkha. There is no reason, therefore, why the rest of the Mayūkha order of succession to the technical strīdhana should not be accepted.

It has already been seen that there is no such thing as non-technical strīdhana according to the Mayūkha: all which is technical property of a woman is her strīdhana whereas all her non-technical property is not her strīdhana.⁽¹⁾ But since the decided cases have been uniform in holding self-acquired property (śilpaprapta) and gifts from strangers as being strīdhana according to the Mayūkha,⁽²⁾ disputes about the line of succession to such property were inevitable. According to Nīlakaṇṭha, as according to the writers of the Bengal School, such non-technical property of a woman devolves upon her sons etc. as if it were her husband's property.⁽³⁾

But the decisions have been otherwise. West J. in Vijiarangam v. Lakshuman⁽⁴⁾ observed that the order of succession to such property should be determined by treating the female proposita 'as if she were a male'. Mayne thought that according to the Mayūkha such property 'is taken by heirs, being sons or otherwise, as would have taken it, if the accident of its falling to a woman had never

(1) aṭṭa's Paribhāṣenduśekhara Kilhorn's edi.p.106 and Jagannātha's Rasagaṅgādhara Nir.edi. p.276 & 501, denote a modest refutation of the view stated immediately before them. Sir Ramakrishna Bhandarkar's opinion has been specially added to the report in the form of a foot-note.

(1) See supra pp. 90-96.

(2) See supra pp. 169-72, 189.

(3) See supra pp. 354-56.

(4) (1871)8 B.H.C.R.244 at 260.

occurred'.⁽¹⁾ But in Manilal v. Bai Rewa⁽²⁾ wherein the point came before the Bombay High Court for a direct decision Telang J. brushed aside both these opinions and held that "the heirs to strīdhan proper and stridhan improper are identical, save that as between the male and female offspring the latter have a preferential right as regards stridhan proper, while the former have a similar right as to stridhan improper."

In Bai Raman v. Jagjivandas⁽⁴⁾ it was held that the doctrine of spiritual efficacy is not applicable to devolution of strīdhana and that therefore the non-technical strīdhana of a woman does not devolve simultaneously upon her sons, grandsons, and great-grandsons. It may accordingly be summed up that in view of the decisions the "non-technical" strīdhana of a woman governed by the Mayūkha has the following line of succession: son, grandson, great-grandson, daughter, daughter's son, daughter's daughter and in default of these the husband and his sapinḍas or the father and his sapinḍas as the case may be.

School

According to the Benares School, the Southern, and the Bombay School where the Mitākṣarā has a preponderance over the

(1) See Mayne referred to in 17 Bom.758 infra at 763.

(2) (1892)17 Bom.758. It need not be added that Mayne and West J., though appearing to be ambiguous, were nearer to truth than Telang J. was. But they did not come across the identical provisions of Raghurama Siromani showing that such property devolves exactly like husband's property; otherwise they would have been more precise in their statement. Telang J., however, is at great pains to explain why in default of the progeny of the woman there is no provision in the Mayūkha for further devolution of this so-called 'stridhan improper'. - See Report at pp.768-70.

(3) 17 Bom.758 at 768.

(4) (1917)41 Bom.618, See also supra p.454.

Mayūkha, there can be no doubt that such "non-technical" strīdhana would devolve according to the general line of succession given in the Mitākṣarā. (1)

The law of the Mithila School and of the Mitākṣarā with regard to succession to a childless woman's strīdhana has been declared by the Courts to be almost identical. (2) But no case has come before the Courts wherein the rule of preference amongst the progeny themselves could have been laid down. According to the authors of the Mithila School ^{all strīdhana except} the yautaka and pitṛidatta strīdhana of a woman devolves jointly upon sons and daughters with unmarried daughters taking preference over the married ones. (3) The order prescribed for the ~~former~~ kind of strīdhana is thus similar to the order given in the Mayūkha for anvādheya etc.. It may not be unreasonable to conclude, therefore, that the order prescribed, according to the Mithila School, for all strīdhana excepting yautaka and pitṛidatta should be the same as the order prescribed by Nīlananṭha for anvādheya and bharṭṛidatta. (4)

Before turning to the decisions on the Dāyabhāga School it would be profitable to recapitulate in the form of synopsis the position of its Śāstric law on this topic. (5)

According to Jīmūta the line of succession to all strīdhana

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- (1) In view of the judicial law self-acquired property and gifts from strangers form strīdhana of woman governed by any school of law. - See supra pp. 169-172, 189.
- (2) Supra pp. 444 and 446.
- (3) See supra p. 360
- (4) For the judicial law on the Mayūkha see supra pp. ⁴⁶⁹⁻⁷⁰ for the śāstric law see supra p. 353.
- (5) For a detailed discussion about the śāstric law of the Bengal School see supra pp. 376-408.

except yautaka and pitridatta is as follows:- uterine son and maiden daughter, married daughter who has or is likely to have a male issue, son's son, daughter's son and barren and widowed daughters taking together. In a parenthetical paragraph he also introduces the step-son and his son as heirs and states that a step-son succeeds in preference to the daughter's son. These are the only heirs amongst the progeny mentioned by Jīmūta. But according to Śrīnātha, Rāmabhadra and Śrīkṛiṣṇa the word 'prajā' (progeny) includes also great-grandson, step-son, step-son's son, and step-son's son's son. Raghunandana and Śrīkṛiṣṇa place the great-grandson above the barren and widowed daughters in the list. Śrīkṛiṣṇa adds the above-mentioned step-children, in the order mentioned, immediately after the great-grandson and before the barren and widowed daughters.

The order of succession to yautaka is, according to Jīmūta, as follows:- unbetrothed daughter, betrothed daughter, married daughter, and son. Śrīnātha and Śrīkṛiṣṇa also mention barren and widowed daughters before the son but Śrīkṛiṣṇa mentions that a daughter who has or is likely to have a male issue supersedes a barren or widowed one. To this incomplete list the commentators Śrīkṛiṣṇa and Śrīkṛiṣṇakānta add the following heirs in order: daughter's son, son's son, son's son's son, step-son, step-son's son and step-son's son's son.

The Dāyabhāga is not quite clear as regards the line of succession to pitridatta. But on the whole it appears that according to Jīmūta the order prescribed for yautaka applies also to

pitṛidatta given by the parents whether before, at the time of, or after the marriage. The commentators Śrīkṛiṣṇa and Śrīkṛiṣṇakānta prescribe for pitṛidatta a special order of succession which, according to the former apparently, and according to the latter definitely, applies to pitṛidatta which is not yautaka i.e. property given by parents either before or after the marriage. However, according to the Dāyākramasaṅgraha of Śrīkṛiṣṇa this order applies to all pitṛidatta whether it is yautaka or ayautaka. The special order is maiden daughter, son, daughter who has or is likely to have a male issue, daughter's son, son's son, son's son's son, step-son, step-son's son, step-son's son's son, and barren and widowed daughters. According to the Dāyākramasaṅgraha, however, a son succeeds in default of all the daughters. Thus the provisions of the Dāyabhāga and the Dāyākramasaṅgraha are in complete accord with each other in this respect.

According to Jīmūta the yautaka obtained by a woman during an approved form of marriage devolves upon the husband whereas the one gained during an unapproved form of marriage devolves upon the mother and then upon the father. According to him the bandhutta, śulka, and anvādheyaka - in fact all property which is not yautaka, devolves successively upon uterine brother, mother, father and husband.

According to the commentators Śrīkṛiṣṇa and Śrīkṛiṣṇakānta the yautaka gained by a woman during an approved form of marriage devolves upon the husband, brother, mother and father whereas yautaka gained during an unapproved form of marriage devolves upon

the mother, father, brother, and husband. They prescribe the same orders of succession for ayautaka: the former order is applicable to ayautaka of a woman married in an approved form whereas the latter order is applicable to the ayautaka of a woman married in an unapproved form.

The order of ultimate heirs, applicable to all kinds of strīdhana in default of the above-mentioned heirs, is uniform according to Jīmūta and his commentators. It is as follows:- Husband's younger brother, husband's brother's son, sister's son, husband's sister's son, brother's son, son-in-law. Jīmūta states that in default of these ultimate heirs the other sapin̄ḍas inherit in their order. Śrīkṛiṣṇa states the successive right of the samānodakas, sakulyas and the king who take in default of all the sapin̄ḍas.

It may be reiterated here again that the order of succession given by Jīmūta is incomplete, unsystematic and at some places even ambiguous whereas the order given by his last two commentators has been comparatively more elaborate, harmonious and precise.

Dwarkanath Mitter J. has laid down the foundations of the modern judicial law of the Bengal School concerning succession to strīdhana. The stand taken by him in a leading decision of the Calcutta High Court must be noted before examining in particular the mischief caused by the later decisions of the same High Court. In Judoonath v. Bussant⁽¹⁾ he tried to explain with the help of the Dāyabhāga some passages in the Dāyakramasaṅgraha which were

(1) (1873)19 W.R.264 followed in Hurrymohun v. Shonaton (1876) 1 Cal.275 and cases mentioned in note (2) below.

obviously contrary to the former and held that the latter was in consonance with the former. The attempt of reconciling these two treatises was indeed so unsatisfactory that the later judges of the same High Court who noticed the contradiction nevertheless followed the decision given by Mitter J. but proceeded on a different ratio: wherever there is a disagreement between Jīmūta and any of his followers the former is to be followed by the Courts.⁽¹⁾

With the exception of the great-grandson and step-children who are introduced only by the later authors of the Bengal School the line of succession to strīdhana amongst the progeny themselves is practically uniform according to all authors of the same School; naturally very few cases in which this order of preferential heirs was under dispute have appeared before the Courts.

In Srinath v. Sarbamangala⁽²⁾ it was held that a betrothed daughter is not entitled to succeed to ayautaka of her mother so long as an unbetrothed daughter existed. Similarly unbetrothed daughter and son are both preferred to a married daughter in succession.⁽³⁾

It has been held that a widowed daughter having a son at the time when the succession opens is to be considered as a daughter

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- (1) Gopal Chandra v. Ram Chandra (1901)28 Cal.311, Ram Gopal v. Narain Chandra (1905)33 Cal.315, Debiprasanna v. Harendra (1910) 37 Cal.863, Mohendra v. Giris Chandra (1915)19 C.W.N.1287, Krishnabehari v. Sarojini (1933)60 Cal.1061, Chamatkari Deyi v. Narendra I.L.R.1947 Cal.Vol.I.p.173, Jyotiprasad v. Baidyanath I.L.R.1949 Pat.75.
- (2) (1868)10 W.R.488. It was contended by the counsel that betrothal means marriage and he relied on Mac.H.L.Vol.I.58 and Vya.Da.2nd edi.645.
- (3) P.J.Delanney v. Pranhari Guha (1918)22 C.W.N.990.

having or likely to have a male issue.⁽¹⁾ But it appears that a widowed daughter having only a daughter cannot be included in this class.⁽²⁾ A daughter's daughter is not an heir at all either to yautaka or ayautaka of her mother's mother as the general principle in Bengal is that women can inherit only under an express text.⁽³⁾ As in a recent case⁽⁴⁾ it has been laid down that step-son etc. cannot succeed to a woman's strīdhana as her progeny their place will be considered while dealing with the heirs to strīdhana of a childless woman.

Succession to pitṛidatta, however, offered a very intricate problem. In Prosanno v. Sarat Shoshi⁽⁵⁾ their Lordships of the Calcutta High Court held by a majority of two to one that pitṛidatta which is not yautaka devolves upon the son in preference to the married daughter. The order given by Śrīkṛiṣṇa in his synopsis on the commentary on the Dāyabhāga was preferred by Brett J. and Mitra J. to the order laid down by him in his Dāyakramasaṅgraha. Both the learned judges pointed out that the word 'kanyā' as used in Manu's verse which is quoted in the Dāyabhāga means,⁽⁶⁾ according to all commentators and lexicographers, unmarried daughters only;⁽⁷⁾ that

(1) Charu Chander v. Nobo Sundari (1898) 18 Cal.327.

(2) See Bhattacharya H.L. 2nd ed. p.599. The reason is that such daughter is not in a position to confer any spiritual benefit on the proposita which is the reason why according to Jīmūta a daughter who has or is likely to have a male issue gets a preferential right.

(3) Madhumala v. Lakshan (1913) 20 C.W.N.627 (Mayne 7th ed. pp.671 & 673, Banerjee 3rd ed. p.429, Sarkar 4th ed. p.463-64 relied upon). The same is the case with a sister's son's son - Satish Chandra v. Haridas A.I.R.1934 Cal.399. See also Vi.Mi. supra

(4) Chamtkari v. Narendra Nath I.L.R.1947 Vol.I.p.173 infra. P.347.

(5) (1908) 36 Cal.87.

(6) Manu 9.198 quoted in Da.Bha.4.2.16 supra.

(7) See 37 Cal.87 at 113-4 wherein Mitra J. states that 'kanyā' (continued)

the order laid down by Śrīkṛiṣṇa in his commentary has been accepted as correct by Macnaghten, Strange, Banerjee, Siromani, Elberling etc; ⁽¹⁾ and that according to the established judicial view the provisions of the Dāyabhāga are to be preferred to the provisions of the Dāyatatva or the Dāyakramasaṅgraha. ⁽²⁾ It was also pointed out that though the order given in the Dāyakramasaṅgraha was accepted in the third edition of the Vyavasthādarpaṇa the view of the author was different in the previous editions and that such change in opinion only weakens the authority of the author. ⁽³⁾

Coxe J., however, adopted a more attractive view: observing that Jīmūta used the word 'kanyā' only because Manu had used the same and not necessarily to include unmarried daughter only he

primarily means maiden daughter and cites in his favour Amara-siṅha, Hemachandra, Medinī, Śabdakalpadrūma, Wilson's dictionary as well as Kullūka, Rāghavānanda, Nandana, and Rāmachandra on Manu 9,198 and all the commentaries on Da.Bha.4.2.16. Only Sarvajñanārāyaṇa commenting upon the above says: "Kanyeti duhitṛimātraparam". But it is remarked that in Bengal the authority of Kullūka is superior to that of Sarvajñanārāyaṇa.

- (1) Macnaghten 1829 edi.vol.I.p.39-40, Strange vol.I.p.247, Siromani 1885 edi.p.398 referred to a report pp.95-97 by Brett J. See also Vya.Da.and Elberling referred to at pp.97 and 114. Banerjee in his first edition gives Śrīkṛiṣṇa's order as generally correct, in his second edition states that order as correct according to some authorities but does not express his own opinion; Vyavastha Darpana 1st edi. follows the synopsis, second edi. is slightly changed and the third edi. puts all the daughters before son; Mayne 8th edi.p.900 accepts all daughters before a son; - see all these authorities discussed in the report at pp.95-98 and at p.114.
- (2) Report at p.114.
- (3) Report at p.114. The third edi. was published after the death of the author. However, Strange was also alleged to have changed his previous opinion that according to the Mitākṣarā inherited property is strīdhana but their Lordships of the Madras High Court did not regard this change to have weakened the authority of Strange. See supra p.130.

further advocated that the Dāyakramasaṅgraha being a later work of Śrīkṛiṣṇa than his commentary the view adopted by the author in his later work should be preferred.

Their Lordships apparently did not understand the import either of the Dāyabhāga or of the commentaries on the same.⁽¹⁾ Jīmūta gives two interpretations for Manu's verse; one is that all pitridatta is to devolve just like yautaka with preference to daughters over sons; the second one is that a step-daughter of Brahmin co-wife should succeed in preference to a son of proposita of a lower caste. Brett J. and Mitra J. have carried an elaborate discussion to show that Jīmūta has used the word 'kanyā' (unmarried daughter) in contradistinction to the word 'duhitā' and they think that the commentators also adopt the same view. They do not refer to the two interpretations put forward by Jīmūta. But Śrīnātha, Rāmabhadra and Achyuta concentrate upon the second interpretation and state that a daughter of a brahmin co-wife succeeds in preference to a woman's own son because she is able to confer spiritual benefit through her son. The explanation shows that these authors included a married daughter also in the words 'brāhmaṇī kanyā'. Maheśvara actually uses the word 'duhitā' and Achyuta appears to repudiate the argument that the word 'kanyā' should be limited to its original meaning, namely, an unmarried daughter. Despite all these authorities their Lordships of the Calcutta High Court ventured to maintain that according to the Dāyabhāga as supported by its commentaries a son succeeds in preference to a married daughter in succession

(1) 'See supra pp.383-87 wherein the commentaries on Da.Bha. 4.2.16 are discussed.

to his mother's pitṛidatta which is ayautaka. It is clear that the decision of their Lordships is in consonance neither with the provisions of Jīmūta nor with those of his followers.

This special order applies, according to Śrīkṛiṣṇa's synopsis apparently and according to Śrīkṛiṣṇakānta's synopsis definitely, only to pitṛidatta which is ayautaka. But according to the Dāyabhāga and the Dāyakramasaṅgraha there is no distinction, for the purpose of succession, between pitṛidatta which is yautaka and that which is not yautaka. The point about succession to pitṛidatta yautaka was not before the Courts but it appears that if we follow the ratio of Prosanno's case the synopsis of Śrīkṛiṣṇa will be preferred to his independent treatise and that instead of applying this special order, the general order prescribed for yautaka will also be applied to pitṛidatta which is yautaka.⁽¹⁾

So far there has been only one case and that too a recent one on succession to yautaka of a childless woman. In Bhadu Dasi v. Gokul Chandra,⁽²⁾ Miter J. held that the husband is to be preferred

(1) But really speaking the line of succession to all pitṛidatta whether it is yautaka or ayautaka should be the same. - See Sarkar 6th edi.p.737. But see Bhattacharya p.595 wherein the author maintains that excepting the fact that an unmarried daughter is preferred to a son in succession to pitṛidatta the rules governing succession to both yautaka and ayautaka apply to pitṛidatta also; he further argues that the special rules about pitṛidatta have no scope at all as regards pitṛidatta which is yautaka. He maintains that Da.Kra.Sam.2.5.2-3 apply to yautaka pitṛidatta and 2.5.4 applies to ayautaka pitṛidatta. This view appears to have been adopted in Ram Gopal v. Narain Chandra (1905)33 Cal.315. But a perusal of the original text (pp.26-27) leaves no doubt that there is no such distinction at all. - See also the dissenting judgement of Coxe J. in Prosanno's case.

(2) A.I.R.1948 Cal.240.

when the yautaka has been obtained in an approved form of marriage while the mother and the father are to be preferred to the husband where the yautaka is obtained during unapproved form of marriage. So far the decision remains unchallenged; for this order is common to Jīmūta, Raghunandana, and Śrīkṛṣṇa. But Mitter J. in this case has relied solely upon Banerjee's statement⁽¹⁾ to this effect and the mischief which can be caused by relying only on a text-book is apparent when one looks to Banerjee's book itself.

Now the question is whether yautaka should directly devolve upon the ultimate heirs in default of the husband in case of an approved form of marriage and in default of the mother and father in case of unapproved form of marriage. Banerjee correctly states that according to Śrīkṛṣṇa the husband, brother, mother, and father successively are heirs in the former case and that the mother, father, brother and the husband are heirs in the latter case. He states this order as being 'generally accepted' and therefore approves the same.⁽²⁾ However, the learned author states that according to Raghunandana the former order is: the husband, mother, brother and father and refers to a portion from which he claims to derive support⁽³⁾ of the *Dāyabhāga*.

(1) Banerjee 5th edi.pp.489-91 relied upon.

(2) See Banerjee referring to Mac.pp.39-40, Strange vo.I.p.251 and Vya.Da.pp.718-19.

(3) See Banerjee pp.490-91 wherein the author relies upon Da.Ta.10.62. But the chapter in the translation consists only of thirty-nine sections. The truth is that Raghunandana simply confirms the order given by Jīmūta - See Da.Ta.trans.10.19 - text p.45. The reference given by Banerjee may be a misprint for Da.Ta.10.26 wherein the text of Devala is quoted. By the context the text may be made applicable to yautaka and the order therein is the husband, mother, brother or the father. But the enumeration given is not necessarily in order of succession; for by context the text may be made applicable to yautaka

But from the foregoing discussion it will have become clear that at the proper place Raghunandana simply confirms the order given by Jīmūta.⁽¹⁾

Now as the provisions given by Jīmūta are preferred to those given by his followers it is quite possible that by analogical reasoning the provisions given by Raghunandana might be preferred to the provisions given by the later author Śrīkṛṣṇa; on a footing of this kind any judge of High Court, who is not in a position to go to the original texts or their translations, may depend upon Banerjee's statement and hold, upon the supposed authority of Raghunandana, that the mother of a woman is preferrable to her own brother in succession to yautaka obtained by her in an approved form of marriage. To avoid such mischief it is essential for a judge of a High Court not to rely solely upon the opinion of a text-book writer.

Coming to succession to ayautaka of a childless woman Judoonath v. Busunt⁽²⁾ appears to be the first case on the point. In this case the property under dispute was given to the proposita, under a testamentary disposition, by her father before her marriage. The property was thus pitridatta which was ayautaka. Their Lordships of the Calcutta High Court observed that Jīmūta is ambiguous on this point and following Macnaghten and Strange who base their view

gained either during approved or unapproved form of marriage and it is obvious that even according to Raghunandana himself the husband cannot be the first preferential heir to the yautaka of a childless woman gained by her during an unapproved form of marriage. See supra p. 395. So it is better to assume that he has simply confirmed in Da. Fa. 10.19 the order given by Jīmūta.

(1) See supra p.

(2) (1871) 16 W.R. 105.

on the order given in Śrīkṛiṣṇa's commentary they held that property obtained by a woman from her father either before or after marriage devolves upon the husband in preference to her brother or mother in cases wherein she has been married in an approved form. This was evidently the correct view.

But the case, came in review before the same High Court⁽¹⁾ and Mitter J. approved the order given in the Dāyabhāga,⁽²⁾ namely, uterine brother, mother, father and the husband, for determining succession either to bandhudatta, śulka or anvādheyaka of a childless woman married either in approved or unapproved form. He tried to show that even Śrīkṛiṣṇa in his Dāyakramasaṅgraha supports this conclusion.⁽³⁾ He was obviously wrong in holding so, for whether ^{Such}

(1) Judoonath v. Bussunt (1873)19 W.R.264.

(2) Da.Bha.4.3.29 was considered to be a resumé of all the discussion started in 4.3.10 wherein Jīmūta refers to Yaj.2.144 mentioning bandhudatta, anvādheyaka and śulka.

(3) Mitter J. quoted Da.Kra.Sam.2.3.15-16 in favour of such conclusion and observed that in conformity with these passages the words "the son and the rest succeed as in the case of property received at nuptials..." occurring in Da.Kra.Sam.2.5.3. include heirs only up to great-grandson but do not include the husband. But section two of the treatise deals with succession only to yautaka whereas section five deals with pitridatta. A casual glance at section five would prove that the limitation suggested by Mitter J. is absolutely uncalled for. Moreover section four of the treatise pertains to ayautaka and paragraph eleven of the same says that the rules about yautaka apply also to all ayautaka of a childless woman in accordance with the form of her marriage. (See supra pp.398-9) Mitter J. also states that in Wynch's translation of Da.Kra.Sam.2.3.15-16 there is a printing mistake, namely, that there should be a full-stop after the word 'successor'. But there is no defect in Wynch's punctuation at all. It is Mitter J. himself who approaches the paragraph with a pre-conceived notion and wants to carve out a particular meaning from the same - see Bhattacharya H.L. 2nd edi.pp.595-97. The contradiction between Da.Bha. and Da.Kra.Sam. was admitted in later cases - See infra pp.484-85.

property is yautaka or ayautaka Śrīkṛiṣṇa, both in his commentary on the Dāyabhāga and in his Dāyakramasaṅgraha gives two uniform lines of succession applicable to all property of a childless woman with preference to one line or the other depending solely upon the form of the marriage of the woman.⁽¹⁾

However in later cases their Lordships of the Calcutta High Court have merely followed the decision given by Mitter J. in Judoonath's case. Thus it has been held that the same rule is applicable to anvādheyaka (post-nuptial gifts) of a woman which was given to her after her marriage by her husband's father's sister's son.⁽²⁾ In Gopal Chandra v. Ram Chandra⁽³⁾ the same order was held to be applicable to the property of a woman which she secures after her marriage, though their Lordships admitted that 'there is no doubt some conflict' between Jīmūta and his followers. On the authority of Judoonath's case it has been held that the same order is applicable to all kinds of ayautaka including ayautaka which is

(1) See supra pp. 398-99.

(2) Hurrymohun v. Shonaton (1876) 1 Cal. 275.

(3) (1901) 28 Cal. 311 (Vya. Da. 3rd ed. pp. 246-48 and 262, and Mayne 6th ed. p. 875 were followed in this case). But the view of Sarkar to the contrary was not followed. But see Sarkar 6th ed. p. 737 wherein the author adversely comments upon the decision in this case.

pitridatta.⁽¹⁾ It was also remarked in this case⁽²⁾ that a particular heir mentioned in the Dāyabhāga does not necessarily include persons of half-blood as well as full-blood. This brings us to the discussion about the right of succession of step-relations.

Jīmūta mentions only uterine brother in this group of 4 heirs to ayautaka strīdhana of a childless woman; so it has been held in Debiprasanna v. Harendra⁽³⁾ that a step-brother is not included in this group of heirs and that the husband's younger brother is to be preferred to the woman's own step-brother. Their Lordships

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- (1) Ram Gopal v. Narain Chandra (1905)33 Cal.315, followed in Debiprasanna v. Harendra (1910)37 Cal.863, Mohendra v. Giris Chandra (1915)19 C.W.N.1287, Chamatkari v. Narendra Nath I.L.R. 1947 Cal.Vol.I p.173. The ratio of these decisions is that Da. Bha.4.3.29 is resumé of a long discussion begun in para.no.10 and so the order mentioned in the former paragraph is to be followed notwithstanding any discussion to the contrary in the previous paragraphs. In all these cases the authority of Śrīkṛṣṇa was brushed aside in favour of the decision in Judoonath's case. In Mohendra's case Fletcher J. observed: "I must accept what has been accepted in this Court for a long time. The Hindu law must be understood not by what it is in the text-books but by what it has been interpreted to be by the judges of this Court." In the same case he held that property given to a sister by her brother 7 years after her marriage but in fulfilment of a promise made at the time of her marriage is, nevertheless, her ayautaka as the promise is not capable of being specifically enforced. But he seems to have neglected the argument of counsel that the property in this case was given at the time of 'dvirāgamana' and that according Churaman v. Gopi (1910)37 Cal.1 such property is to be treated as yautaka. For 'dvirāgamana' see supra p.69.
- (2) Ram Gopal's case supra.
- (3) (1910)37 Cal.863. To substantiate their view that the word 'bhrātā' includes only full brother their Lordships referred to Hemachandra, Bothlingk and Roth: Sanskrit Worterbuch Vol.III p.1201 and Sam.Na.Mandlik's edi.p.80: "bhrātrītvam ekapitṛimātrijanyatvam". See also Vya.Ma.142. Followed in Gunamani v. Debi Prasanna Roy (1919)23 C.W.N. (husband's younger brother preferred to a son adopted by the father of the proposita after her mother's death). Incidentally the mistake in Colebrook's translation of Da.Bh. 4.3.31 was pointed out in Debi Prasanna's case. See also Setlur's translation of the same paragraph where-

(continued)

held that the doctrine of spiritual benefit cannot be invoked in favour of a step-brother as Jīmūta mentions only four heirs in the first group and six ultimate heirs in the second group. The case was followed by their Lordships of the Patna High Court in Jyotiprasad v. Baidyanath.⁽¹⁾

Similarly in Krishnabehari v. Sarojini⁽²⁾ it was held that a brother's son succeeds in preference to a step-daughter's son. Their Lordships brushed aside the authority of the commentaries of Śrīkṛiṣṇa and others who include step-daughter and her son in the paragraph wherein Jīmūta parenthetically introduces step-son and step-son's son as heirs,⁽³⁾ and observed that Śrīkṛiṣṇa being more zealous about the doctrine of spiritual benefit, introduces these additional heirs whereas Jīmūta is more equitable and authoritative.⁽⁴⁾ It was also remarked that a particular heir mentioned in the Dāyabhāga does not necessarily include a person of half-blood as well as of full-blood. Although the decision in this case was right the

in the words 'paternal uncle's wife' should be introduced in between the maternal uncle's wife and the father's sister; also Goldstucker's paper supra p.445.

- (1) I.L.R.1949 Pat.75. See report at p.83 wherein on the authority of Col.Dig.vol.II p.612 their Lordships refused to apply the doctrine of spiritual benefit.
- (2) (1933)60 Cal.1061.
- (3) See supra for Da.Bha.4.3.33 and the commentaries upon the same.
- (4) 60 Cal.1061 at 1066 (Banerjee cited for holding that Jīmūta is more equitable). It was also pointed out that Colebrook's translation of Da.Bha.4.3.33 wherein the word 'sapatnīputra' has been translated by him as 'the child of a rival wife' has been more in consonance with view of the commentators and not of Jīmūta and hence wrong. For once the view held by their Lordships of the Calcutta High Court appears to be correct; because Śrīkṛiṣṇa, although he mentions a step-daughter and her son in his commentary on this paragraph, does not mention these heirs in his synopsis - See Da.Bha.4.3.40-42.

was reasoning definitely wrong. It was from Banerjee⁽¹⁾ that their Lordships of the Calcutta High Court borrowed their idea that succession to strīdhana, according to the Bengal School, is not as much governed by the doctrine of spiritual efficacy as by natural love and affection. The statement may be true in a few cases; but Jīmūta as properly understood by all the commentators from Śrīnātha to Śrīkṛiṣṇa-kānta has not deserted this principle even in succession to strīdhana.⁽²⁾ But the misunderstanding of their Lordships of the Calcutta High Court was of such long standing that any more recent suggestion to the contrary was promptly negatived by them in every case.

But it is necessary to refer to an older case which had been neglected in Debi Prasanna's case. In Dasharathi v. Bipin Behari,⁽³⁾ Golapchandra Sarkar argued that capacity to offer spiritual benefit is the governing principle also in succession to strīdhana according to the Bengal School and that the ultimate heirs have been given their preferential place only because of this doctrine. Accordingly, their Lordships, though they did not exactly agree with Sarkar, held that a half-sister's son succeeds in the place of a sister's son on account of his equal capacity of conferring spiritual benefit and is to be preferred to the husband's elder brother.

Dasharathi's case was not referred to in Debiprasanna's case but was considered in Krishnabehari's and Jyotiprasad's cases

(1) See supra p.380 and infra p.490.

(2) For instance see Da.Bha.4.3.35-37.

(3) (1904)32 Cal.261 followed in Shashi Bhushan v. Rajendra Nath (1912)40 Cal.82. The ratio in Dasharathi's case was based upon Bhola Nath Roy v. Rakhal Dass Mukherji (1884)11 Cal.69.

but it was held in these latter cases that the decision in Dashar-
athi's case is limited only to the line of ultimate heirs. But it
is evident that what is applicable to a step-sister's son is also
applicable mutatis mutandis to a step-daughter's son or step-brother
etc. ⁽¹⁾

It is now important to determine the position of a step-
son, his son and his son's son which has been recently shifted by a
decision of the Calcutta High Court. It must be noted that most of
the old as well as the new text-books show these three successive
heirs as taking their place immediately before the husband or the
mother, as the case may be, in succession to yautaka and immediately
before the barren and the widowed daughters in succession to ayaut-
aka. ⁽²⁾ Their position has thus been fixed on the authority of
Śrīkṛiṣṇa. It should be remembered that Jīmūta, in a parenthetical
paragraph, ⁽³⁾ introduces the step-son and his son as heirs and puts
the step-son even before the daughter's son although the commentators
who comment on this paragraph deny this preferential position to a
step-son.

In Purna Chandra v. Gopal Lal ⁽⁴⁾ Mukherjee J. held, on the
supposed authority of the commentators, that this very paragraph

(1) But see Nogendra v. Benoy (1902)31 Cal.521 at 527 wherein
Stephen J. observed: "...That the characteristic doctrine of
the Bengal law is that, as far as the nearer relatives are con-
cerned, inheritance depends on consanguinity; but in the case
of remote relations the law falls back on the principle of
spiritual benefit."

(2) See Macnaghten p.39; Mayne 749-51; Bhattacharya 590-93;
Grady 196-98; Mulla 152-54. However, as regards the position
of these heirs in succession to ayautaka Mayne, Mulla and
Gupte refer only to the authority of the Dāyakramasaṅgraha.

(3) Da.Bha.4.3.33 supra p.

(4) 8 C.L.J.369 referred to in Chamatkari's case.

which introduces, and determines the position of, a step-son is spurious. Their Lordships of the Privy Council, without considering the genuineness of this paragraph, reversed the decision in this case on another point.⁽¹⁾ It is because of this, it seems, that the same learned judge did not venture to say anything in Debiprasanna's case⁽²⁾ about the genuineness of this paragraph. In Krishnabehari's case⁽³⁾ their Lordships were inclined to think that though Jīmūta mentions the right of the step-son etc. he does not indicate their position and that they need not succeed as progeny of a woman.

So far the decisions in which the step-relations of a woman were not given the place of their co-relative heirs of full-blood were based on an inclination to think that the enumeration in the Dāyabhāga is successive and complete. They dealt with step-relations like step-brother etc. who have not been mentioned by Jīmūta at all. But the question about the right of the step-son came before the Calcutta High Court in a recent case of Chamatkari v. Narendra Nath⁽⁴⁾ and their Lordships gave a devastating decision to the effect that succession to ayautaka of a woman devolves, in default of her issue, upon her brother, mother, father and the husband and that a step-son can come in only after the husband. Following the lamentable tradition of the Calcutta High Court of

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- (1) Gopal Lal v. Purnachandra (1921)49 Cal.P.C.459. The reader ought to be reminded here that although Achyuta and Śrīkrishna refuse to put the step-son before the daughter's son and thus take a more equitable view than their master they do not totally deny the right of a step-son to inherit to his step-mother's property as her son.
- (2) (1910)37 Cal.863 supra. See a remark to this effect in Krishnabehari v. Sarojini (1933)60 Cal.1061 at 1068-69.
- (3) ibid at pp.1068 onwards.
- (4) I.L.R.1947 vol.I.p.173.

misjudging the opinion and importance of Jīmūta's commentators their Lordships observed that according to all the commentators the parenthetical paragraph in the Dāyabhāga which fixed the position of a step-son before daughter's son was spurious. Noticing that in the Dāyatatva and the Dāyakrasaṅgraha the step-son has been introduced even before the widowed and barren daughters their Lordships remarked that Jīmūta is more equitable than his followers;⁽¹⁾ that Śrīkṛṣṇa in his commentary on the Dāyabhāga contradicts his opinion expressed in the Dāyakramasaṅgraha,⁽²⁾ that the spiritual reasoning given in the Dāyatatva for admitting a step-son as an heir amongst the progeny is not correct;⁽³⁾ that Macnaghten, Strange and others merely

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- (1) Ibid at p.181. As usual Banerjee (5th edi.p.477) is referred to with approval. But Banerjee does not totally deny the right of a step-son to inherit his step-mother's strīdhana as her son. He simply says that the step-children should not succeed before the barren and widowed daughters in succession to ayautaka. But he accepts the opinion of Śrīkṛṣṇa that a woman's own great-grandson and her step-son etc. should succeed immediately after son's son in succession to yautaka. - See Banerjee p.483. Thus even in the former case it seems that according to the learned scholar the step-son etc. succeed as sons after the barren and widowed daughters; otherwise he would have mentioned these heirs as being entitled to succeed as sapinḍas after the ultimate heirs at a place where he deals with the right of the former. - See Banerjee at pp.498-99. Unfortunately this is one of the many lacunae in his otherwise useful book.
- (2) Report at p.181-82.
- (3) Report at p.182-83. Da.Ta.10.25 has been referred to wherein the author says that step-son etc. should succeed before the husband etc. because the latter have no capacity to present oblations which can be enjoyed by the deceased proposita. But their Lordships point out that according to Da.Kra.Sam.1.8.1-2 and Maheśvara on Da.Bha.4.3.33 a woman does not share the oblation offered to her husband by her step-son so that his position is none better. See also Da.Bha.3.2.30 and 11.6.3 upon the authority of which it has been held that a step-mother is not entitled to succeed to her step-son. See Mayne p.624. But on the other hand see Da.Kra.Sam.2.3.13 and 2.4.9 which pertain to strīdhana succession and in which Śrīkṛṣṇa states that a son and grandson of a step-son succeed because they offer pinḍas to the husband of the proposita in which she partakes.

'reproduced' tables from the Dāyakramasaṅgraha and that according to the established judicial view the opinion of Jīmūta is to be preferred to that of his followers.⁽¹⁾

They gave the gist of their view in these words: "We cannot say that the list of heirs given in the Dāyabhaga in regard to stridhan property of a woman is complete or exhaustive. But we are definitely of the opinion that to the extent the author purports to enumerate the heirs specifically one after another, the list must be taken to be complete, and there is no room for introducing any person who has not been expressly mentioned in between persons specifically enumerated. As has been said already the rules of succession to stridhan property are not based on a uniform principle like that of spiritual benefit and it cannot be said that the commentators in the present case have merely applied the principle which is enumerated by the author...".⁽²⁾

It is sufficient to say that their Lordships have misinterpreted the Śāstric law on each and every ground which they have resorted to for the purpose of substantiating their conclusion.⁽³⁾ Moreover according to the Dāyabhāga the doctrine of spiritual benefit is as applicable to succession to strīdhana as to succession to

(1) For these see supra pp.475-76.

(2) Report at pp.178-79.

(3) For the alleged spuriousness of Da.Bha.4.3.33 see supra pp.404-5. However, about the spiritual efficacy of a step-son there appears to be a conflict of opinion - see supra p.490. Mitra Miśra on the other hand admits the right of a step-son to succeed as a son on the ground of established tradition - see supra p.346. The same must be the reason why the later authors of the Bengal School ascribe a preferential position to step-son etc.

a male's property.⁽¹⁾ A few exceptions to this principle are seen in succession to a male's property as well as in succession to strīdhana.⁽²⁾ Moreover if in succession to a male's property heirs that are not mentioned in the Dāyabhāga but who are recommended, whether on the ground of spiritual efficacy or otherwise, in the Dāyakramasaṅgraha are entitled to succeed in the position ascribed to them by Śrīkṛiṣṇa there is no reason why the same rule should not be made applicable to succession to strīdhana also. Even Banerjee upon whose alleged opinion the decision in this case appears to have been based does not put step-son etc. after the husband but simply postpones them till after the widowed and barren daughters.⁽³⁾ Moreover it is to be noted that he admits, on the ground of spiritual efficacy, the suggestion of Jagannātha that the father's kinsmen and mother's kinsmen should succeed in between the samānodakas and the Crown though they are not mentioned either by Jīmūta or by Śrīkṛiṣṇa.⁽⁴⁾ There is, therefore, no reason why the step-son etc. should not be given the position ascribed to them by Raghunandana and Śrīkṛiṣṇa.

(1) See supra pp. 379-80, 399-400, 404, 406.

(2) For instance in succession to a male's property the father and mother of the deceased are preferred to many heirs who are capable of conferring better spiritual benefit on the deceased. See Gaṇeśabhaṭṭa's Da.Vya.Sam.f.1(a): "Yah śrāddhakartā sa eva na sarvatra dhanādhikārī prāyikatvāt. Yathā mātāpitarau dāyādhikāriṇau śrāddhādhikāriṇastu bhrātrādayaḥ." See also Akshay Chandra v. Haridas (1908) 35 Cal. 721 wherein several instances are quoted in which the test of spiritual efficacy either fails or is not the sole test. See also Mayne 11th ed. p. 682.

(3) See supra p. 420.

(4) Banerjee 5th ed. p. 500. He remarks: "One of the strongest arguments in support of this view is the fact that it is deducible from the doctrine of spiritual benefit, which is so emphatically and so repeatedly declared by the founder of Bengal School to be applicable to the devolution of strīdhana."

The decision which has been given with regard to ayautaka is equally applicable to yautaka also as the same paragraph of the Dāyabhāga which has been declared to be spurious is applicable to both. Most of the text-book writers admit the right of the great-grandson, step-son, step-son's son and step-son's son's son immediately after the son's son in yautaka succession and some state that they succeed in the same way but before the barren and widowed daughters in ayautaka succession.⁽¹⁾ All of them will have to be amended now. The worst thing is that according to the ratio of the decision even woman's own great-grandson cannot succeed before all heirs enumerated in the Dāyabhāga. This creates a lot of intricacies in determining the line of succession after the so-called ultimate heirs.

In default of the ultimate heirs mentioned in Brihaspati's text Jīmūta mentions that the sapinḍas like husband's elder brother or father-in-law succeed in accordance with their degree of sapinḍaship.⁽²⁾ This remark by itself shows that Jīmūta did not expect the step-children to succeed after the six secondary sons mentioned by Brihaspati; if he did there can be no doubt that he would have denominated the sapinḍas as the step-son etc. instead of the father-in-law etc.. The effect of the decision in Chamatkari's case is felt here also since according to it it is evident that even a woman's own great-grandson would succeed in this group. The heirs,

(1) Mac.Vol.I.p.39-40; Vya.Da.716-19; Bhattacharya pp.590 & 593; Mayne 11th edi.p.749-51; Banerjee p.483 (for yautaka) and p.484 (for pritidatta).

(2) See supra p.406.

accordingly would be: step-son, step-son's son, step-son's grand-son and woman's own great-grandson succeeding together, step-daughter, step-daughter's son, the father-in-law, the husband's elder brother etc.. They would come in the same order in which they would succeed to the property of the husband of the deceased. (1)

The position of a woman's own great-grandson in this set of heirs appears to be ludicrous since he is superior, both from the point of consanguinity or spiritual efficacy, to all the persons who are heirs to strīdhana of a "childless" woman. The position of a step-son is also not less surprising since, taking into consideration the decision in Dasharathi's case, a woman's half-sister's son would exclude her own step-son. These anomalies in the law have been brought about by the fact that the decisions which are contrary to

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- (1) Although Śrīkrishṇa admits in his commentary on Da.Bha.4.3.32 the right of step-daughter and her son as being included in the words 'suta' and 'tatsuta' he does not mention them in his synopsis on Da.Bha.4.3.40-42. Bhattacharya, after having noticed the above thing, appears to neglect the right of these heirs. - Bhattacharya H.L.2nd edi.p.600. Sarkar gives a peculiar position to step-children whom he puts after the set of four heirs 'the husband etc.', who succeed in different order accordingly as the property is yāutaka or ayautaka, and before the six secondary sons mentioned by Bṛihaspati. Amongst the children of a rival wife inter se he fixes the order as her son, daughter, son's son, and daughter's son. - Sarkar 6th edi. p.736. According to him this order applies to both yautaka and ayautaka. In view of this provision the caption for the last paragraph on p.739 of the same edition of his book namely, 'step-sons are treated as sons' is a misprint. Read 'sons-in-law' instead of 'step-sons'. According to Banerjee it seems that amongst the sapindas first the father-in-law and then the husband's elder brother succeed. After them he admits, on the authority of Jagannātha, great-grandson in the male line of the father-in-law, husband's paternal grandfather and his 'issue' and next the husband's paternal great-grandfather and his 'offspring'. But he seems to have totally forgotten about the step-daughter and her issue. See Banerjee pp.498-99.

each other have been given by the divisional benches of the same High Court. It must be remarked that it would have been more reasonable on the part of their Lordships in Chamatkari's case to have had referred the case to the full bench instead of deciding it themselves. The full bench of the High Court would have brought at least uniformity, if not correctness, into the law of the Bengal School.

According to Śrīkṛiṣṇa the sakulyas, samānodakas and the Crown in that order inherit in default of the sapinḍas of the proposita and this position has been accepted by the text-book writers.⁽¹⁾ Jagannatha mentions that the kinsmen, up to the tenth degree, of the father and then of the mother should inherit in the absence of samānodakas, and before the Crown. This addition has been accepted on the grounds of spiritual efficacy also by Banerjee.⁽²⁾ There is no reason why this suggestion should not be accepted on the grounds of equity if not necessarily of spiritual efficacy.

Śrīkṛiṣṇa does not authorise a king to take by escheat the property of a brahmin woman.⁽³⁾ But notwithstanding a similar provision concerning the property of a brahmin male it has been held that the property of a brahmin male is escheated to the Crown in the absence of heirs,⁽⁴⁾ so it seems inevitable that the rule in favour of a brahmin woman also will be disregarded by the Courts.

Thus there are two special features of Jīmūta's system of

(1) Banerjee p.499, Bhattacharya p.598, Mayne 11th edi.p.750. But only father's kinsmen are mentioned after the husband's sapinḍas in Sarkar 6th edi.p.736.

(2) Banerjee p.500, Mayne p.750.

(3) See Da.Kra.Sam. supra p.406. For the general attitude of Courts against escheat see supra pp.461, 466.

(4) Collector of Masulipatam v. Cavalry Venkata (1961)8 M.I.A.529.

childless

succession to strīdhana of a married woman. One is that the only heirs on the father's side of a woman that are accepted by Jīmūta are the father, mother, uterine brother, sister's son, and brother's son. No other heir on the father's side has been mentioned by him in succession either to yautaka or ayautaka. The second is that all the property which a woman gets after her marriage as also all her property which she obtains from her parents devolves upon the first three heirs of the parental family in preference to even her husband and his family; but in default of these three heirs the line of succession reverts again to her husband and his family to the total exclusion of all except the remaining two heirs in her father's family.

According to the Śāstric law of the Bengal School immovable property which is given to a woman by her husband, property which is given to her by strangers and property which is acquired by herself is not her strīdhana.⁽¹⁾ But according to the case-law the first category in some cases and the latter two categories in all cases form strīdhana of a woman.⁽²⁾ But questions of succession to such property do not appear to have come before the courts. Like Nīlakaṇṭha the later authors of the Bengal School pronounce that such property would devolve upon the sons etc. as if it were the woman's husband's property;⁽³⁾ but they definitely proceeded on an assumption that such property, though it formed an object of woman's ownership, was something less than strīdhana. Now that the Courts

(1) See supra pp. 109-10.

(2) See supra pp. 169-72, 189.

(3) See supra pp. 115-16, see also Vi. Se. f. 71(a) supra p. 361.

have held such property to be strīdhana the inescapable conclusion is that the general rules of devolution of strīdhana should also apply to such property.⁽¹⁾

When strīdhana of a woman is inherited by another woman it does not become the strīdhana of the latter according to all except the Bombay School. In such case it reverts to the strīdhana heirs of the original proposita and the same rules would be applicable to the second devolution as to the first devolution.⁽²⁾

For succession to a maiden's property the order stated by Baudhāyana and accepted by Jīmūta is uterine brother, mother and father.⁽³⁾ It has never been challenged so far in Courts. In default of the father it appears that the property would devolve upon the father's sapinḍas in the same order in which they would take his property according to the law of the Bengal School. Thus unlike the Mitākṣarā system, according to the Dāyabhaga system the heirs to strīdhana of a maiden and of a childless woman married in an unapproved form are not identical. As regards the property of a betrothed daughter who dies before marriage Śrīkṛiṣṇa follows the provision of Yājñavalkya that the bridegroom should get back the property given by him to the deceased bride. He further remarks that in such case it is customary for everybody to take back whatever he gave to the bride at the time of her betrothal.

Thus after having surveyed the judicial decision we may now turn to customs and customary law and finally to the new enacted law which has brought about a metamorphosis both in the ordinary Hindu law and customary law.

(1) Succession would depend upon such questions as whether such property has been yautaka or not etc.

(2) See supra p. 420.

(3) Supra p. 394.

It is indeed impossible to complete the study of strīdhana without noticing the various provisions of the different customary laws and individual customs about the same. Due to the variegated and complex nature of these customs and customary laws it is almost impossible for a single person to make a complete research into them so as to incorporate in a sort of a compendium all the material available on the subject.

Before noting the importance of custom and customary laws and the various provisions thereof it is necessary to ascertain the correct meaning of the terms 'law', 'custom' and 'customary law'. As to the meaning of the term law there are two leading schools, namely, the historical one and the analytical one. The former is headed by authors like Hale, Blackstone, Henry Maine etc. whereas the latter is supported by Hobbes, Bentham, Austin etc. The real difference between these two schools lies on the point whether constraint or consent is, in the last resort, the principle from which law derives its validity.⁽¹⁾

Positive law, according to Austin, is a rule "set by political superiors to political inferiors."⁽²⁾ According to him it

(1) S.Roy: T.L.L.(1908); for different theories of jurisprudence see Karunamay Basu: The Modern theories of jurisprudence (1925) T.L.L.1921, (for the characteristics of the historical school see ibid pp.217-18; for those of analytical school see pp. 235-367); Sir Paul Vinogradoff: Outlines of Historical Jurisprudence (1920) pp.103-160 etc.

(2) "The matter of jurisprudence is positive law; law, simply and strictly so called: or law set by political superiors to political inferiors." - Austin's Jurisprudence (1911) Vol.I. p.85.

is a "creature of the sovereign or State: having been established immediately by the monarch or supreme body, as exercising legislative or judicial functions: or having been established immediately by a subject individual or body, as exercising rights or powers of direct or judicial legislation which the monarch or supreme body has expressly or tacitly conferred."⁽¹⁾ He holds that a custom does not become positive law till it is recognised by a judicial court and includes unrecognised customs in what he calls positive morality.⁽²⁾ Holland, although he practically adopts the definition given by Austin, goes a step further by admitting that when a Court recognises the validity of a particular custom it implies that "the custom was law before it received the stamp of judicial authentication."⁽³⁾

Blackstone defines municipal law as "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong."⁽⁴⁾ However, he admits int

(1) Austin Juris.(1911)Vol.II.p.534.

(2) Austin Juris.Vol.I.p.87. See also ibid. pp.101-2. "At its origin a custom is rule of conduct which the governed observe spontaneously, and not in pursuance of a law set by political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the Courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.... Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or the establishment of political superiors. But, considered as moral rules turned into positive law, customary laws are established by the state: established by the state direct when customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals."

(3) Holland Juris.p.53 referred to in T.L.L.(1908)pp.4-5.

(4) Blackstone's Commentaries on the Laws of England (1826)Vol.I. p.41.

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the term law both *lex scripta* and *lex non scripta* and he calls this latter the common law of England.⁽¹⁾ About the *lex non scripta* he remarks: "And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people."⁽²⁾

Vinogradoff says: "Laws may be commands of the Sovereign in a formal sense, but Law is not the aggregate of such commands but the aggregate of all rules directed towards ensuring order in the Commonwealth, whether these rules are made by legislators, laid down by the judges in their administration of justice or worked out by customary practice. Law exists for the sake of order, while right is essentially the measure of power. Hence an adequate definition of law is bound to reckon with the concepts of order and power."⁽³⁾ Amongst the modern law lexicons only two seem to contain an attempt to define and explain the term law; from amongst these latter Wharton follows the stand taken by the analytical school whereas Byrne follows the historical school.⁽⁴⁾

(1) Ibid. Vol.I.pp.57 & 60.

(2) Ibid. Vol.I.p.68. The eminent Hindu law scholar Mayne obviously follows the historical school of jurisprudence when he remarks "The beginnings of Law were in Custom. Law and usage act, and react, upon each other. A belief in the propriety, or imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour following a particular course of conduct produces a belief that it is imperative, or proper, to do so." - Mayne, 11th edi. pp.63-64.

(3) Sir Paul Vinogradoff: *Outlines of Historical Jurisprudence* (1921)p.119.

(4) Wharton's *Law Lexicon* p.573; *A Dictionary of English Law* p.519.

To examine the relative importance of custom and law it is necessary to see which of the schools gives a correct definition of the term law. According to the analytical school customs not recognised by the judicial courts are not part and parcel of law but constitute mere rules of positive morality. But it is impossible to hold the position that the political sovereign in the state is the only fountainhead of law; for, in the first place, this would bring mischievous results in comparative jurisprudence about primitive law. "In a savage community it is often hard to distinguish any sovereign, any determinate person or body of persons vested with the power either of making or of maintaining the laws. Nevertheless, the result is not anarchy. On the contrary, such a society is normally so law-abiding, in the sense of responsive to the social routine, that it might seem almost superfluous to provide a legal machinery that must actually but rust in disuse. A closer scrutiny, however, would disclose a considerable degree of coercive power, diffused through the body politic if not centralized in official hands, such as reinforces the strong natural propensity of the unreflective to keep in the fashion."⁽¹⁾ This custom is as easily observed in a savage community as law in a politically advanced society; for "custom is social habit partly based on a general inclination to conform and a no less general disinclination to suffer as a non-conformist;"⁽²⁾ therefore it has as much sanction as the 'positive' law itself has. Thus, as Bagehot explains, the imitative tendency

(1) Encyclopaedia Britannica (1957) Vol.13 p.781.

(2) Ibid. p.781.

coupled with the persecuting tendency forms the legal fibre of a primitive society⁽¹⁾ and the customs followed therein do constitute law though primitive one.

Secondly, even in a politically advanced society the rudiments of the enacted law of a particular country are to be found in the customary law of that country. Custom is, in its origin, definitely anterior to enacted law. In its elementary growth statute law was usually nothing more than the complex system of customary law as recognised by a political sovereign. The Law in Greece, Rome⁽²⁾ and England⁽³⁾ was based upon custom. Thus in England King Alfred thought it expedient to compile his dome-book or liber judicialis which contained the local customs of the several provinces of his kingdom. A common digest of uniform law was prepared in the reign of King Edward the Confessor and similar attempts to make digests of customs were made in Sweden and Spain in the 13th century, and in Portugal in the fifteenth century.⁽⁴⁾ Thus the original 'positive law' was hardly distinguishable from custom. Again, as in the case of the British Constitution, even in modern times, customs do grow up *pari passu* with the enacted law and the former claim the same unquestionable reverence as the latter does. Thus from the point of view of coercive sanction or uniform observance, custom is hardly distinguishable from positive law. The only

(1) Walter Bagehot: *Physics and Politics*, 18th ed. chap. I.

(2) The Roman Law was adopting custom when written law was deficient: Blackstone Vol. I. p. 67-68.

(3) About Common law see *supra*; see also K. Kahana Kagan: *Three Great Systems of Jurisprudence* (1955) pp. 101-103.

(4) Blackstone Vol. I. pp. 58-59.

jurisprudential distinction between the two is that whereas Courts are bound to follow even vexatious or unreasonable provisions of the positive law they are not bound to accept as valid each and every proved custom: for instance, a Court may refuse to give effect to a custom which is immoral or opposed to public policy. But considering the fact that even according to Austin every custom possesses the potency of becoming 'positive law' the modern definition of law as a subject of jurisprudence should be "the sum of influences that determine decisions in Court of Justice."⁽¹⁾ This definition does justice to the political as well as to the psychological and anthropological views which are all taken into consideration by the comparative jurisprudence of the modern era. With this definition in mind it is improper to underestimate the importance of custom as law and/or as a source of future 'positive law'.

It is necessary here to know what exactly custom is. Austin says that: "At its origin a custom is a rule of conduct which the governed observe spontaneously, and not in pursuance of a law set by a political superior."⁽²⁾ But their Lordships of the Judicial Committee once defined custom as "a rule which in a particular family or in a particular district has from long usage obtained the force of law."⁽³⁾ Remarking that the *leges non scriptae* "receive their binding power, and the force of laws, by long and immemorial

(1) Encyclopaedia Britannica (1957) Vol.13 p.198.

(2) Supra p.493 note 2.

(3) Hurpershad v. Sheo Dyal (1876) 3 I.A.259.

usage, and by their universal reception throughout the Kingdom"⁽¹⁾

Blackstone further observes: "... in our law the goodness of a custom depends upon its having been used time out of mind, or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary."⁽²⁾ Custom, therefore, may be defined as a long-standing rule of conduct which is so uniformly and strictly observed by the members of a particular family, group, community or country as to have acquired in that particular family, group etc. a sanction equal, in its coercive power, to that of a political sovereign.⁽³⁾ Custom is equal to law in accordance with the principle that what the sovereign permits he commands.

Custom is different from prescription⁽⁴⁾ as the latter attaches only to an individual person or his estate; ^{it} is to be dis-
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- (1) Commentaries on the laws of England Vol.I.p.57. This peculiar nature of its sanction forms a distinctive feature of custom. See Vangerow's Lehrbuch der Pandekten t.1 xiv and Thibaut's System der Pandekten p.15 in T.L.L.(1908)p.12.
- (2) Blackstone Vol.I.p.60.
- (3) The definition is intended to be midway between the historical and the analytical school: although it admits custom to be a source of law it does not obliterate that fine line which distinguishes unrecognised custom from the 'positive law' of the analytical school. See also T.L.L.(1908)p.5: "Custom, therefore, may be defined to be a rule of conduct uniformly governing a community from time immemorial." Apart from anything else the definition is too narrow since it does not include the family customs which the author himself deals with in a subsequent chapter. See also: "Custom may be defined to be a law or a right not written which being established by long use and consent of our ancestors has been and daily is put in practice" Les Termes De La Ley quoted in Wharton's Law Lexicon p.573 and Stroud Vol.I.p.701. The definition of custom given in s.3(d) of the Hindu Succession Act, 1956, and s.3(a) of the Hindu Marriage Act, 1955, is similar to the one given in the present work.
- (4) T.L.L.(1908)p.6. But the new Hindu enactments treat custom and usage as synonymous words.

tinguished from usage which usually has less antiquity than a custom has.⁽¹⁾ As against custom which may be judicially recognised in some cases, every usage requires to be strictly proved in a Court of law.⁽²⁾

Blackstone divides English unwritten law into three parts, namely, 'general Customs' or the common law properly so-called, 'particular customs' which affect the inhabitants only of a particular part of the country and 'particular laws' that are 'by custom' observed only in certain courts like the ecclesiastical or military courts.⁽³⁾ The validity of the common law depends upon the judicial decisions. But a particular custom, according to Blackstone, is required to be strictly proved and even when proved the next enquiry is into the legality of the same; 'for, if it is not a good custom, it ought to be no longer used; "Malus usus abolendus est" is an established maxim of the law'.⁽⁴⁾ He, therefore, lays down the following requisites for a valid custom:

- (a) 'that it must have been used so long, that the memory of man runneth not to the contrary'.
- (b) 'It must have been continued'.
- (c) 'It must have been peaceable, and aquiesced in; not subject to contention and dispute.'
- (d) It must be 'reasonable' or rather taken negatively, it 'must not be unreasonable.'

(1) T.L.L.(1908)p.6.

(2) Wharton p.1029. But see Encyclopaedia Americana (1957)Vol.8 p.337. This however, is not true in India wherein according to the Indian Evidence Act every custom is required to be proved - See supra p.429. Moreover the words custom and usage are used synonymously in India as well as in the United States.

(3) Blackstone Vol.I.p.57 & 60. See also Byrne: A dictionary of English Law p.271.

(4) Blackstone Vol.I.p.71.

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- (e) It 'ought to be certain.'
 - (f) It must be compulsory; and not left to the option of every man.
 - (g) It ought to be 'consistent' with other custom.⁽¹⁾

In India the importance of customs and usages was recognised by an Act of Parliament and by subsequent central and provincial enactments whereby in determining disputes coming under the perview of the personal law of the two parties all British Courts were required to give a decision in accordance with the esbatlshed custom and usage whether they were in derogation of the ordinary personal law or not.⁽²⁾ As early as in the year 1868 the Judicial Committee in the Ramnad case laid down the cardinal principle of Hindu law, namely, "under the Hindu system of law clear proof of usage will outweigh the written text of the law."⁽³⁾

The essentials of a valid custom in Hindu law are that it must be:-

- (a) ancient,
- (b) continuous,

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- (1) Blackstone's Vol.I.pp.71-73; Wharton p.292; T.L.L.(1908)p.26. As against the last requisite mentioned by Blackstone see Sir Frederick Pollock: A first book of jurisprudence p.279 note 1.
 - (2) 21 Geo.III, C.70,S.17; Indian Regulation IV of 1793 s.15; Act XII of 1887 s.37; Bombay Regulation IV of 1827; Act II of 1864 s.15; Burma Act XVII of 1875 s.5; Central Provinces Act XX of 1875 s.5; Madras Act III of 1873 s.16; Oudh Act XVIII of 1876 s.3; Punjab Act XII of 1878 s.1; Burma Courts Act XI of 1889 s.4; Arakan Hills Regulation VIII of 1876 s.5; Terai Reg.IV of 1876 s.5; Ajmere Regulation VI of 1877 s.4; Indian Contract Act IX of 1872 ss.1 and 110; Indian Trusts Act II of 1882 s.1; Bengal Tenancy Act VIII of 1885 s.183; Oudh Land Revenue Act XVII of 1876 s.31; N.W.P.Rent Act XII of 1881 s.29 etc. referred to in T.L.L.(1908)pp.23-24.
 - (3) Collector of Madura v. Moottoo Ramlinga (1868)12 M.L.A.397 at 436. For the śāstric basis of this rule see supra; introduction.

(c) certain;

(d) and must not be unreasonable.⁽¹⁾

In a case wherein a special usage of succession was set up, their Lordships of the Madras High Court observed: "What the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, district, or country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."⁽²⁾ Affirming this rule their Lordships of the Judicial Committee remarked: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the condition of antiquity and certainty on which alone their legal title to recognition depends."⁽³⁾

However as in the United States,⁽⁴⁾ so in India, the

(1) Mayne 11th edi.pp.65-69.

(2) Sivanananda v. Mutta Ramalinga (1866)3 M.H.C.R.75 at 77.

(3) Ramlakshmi v. Sivananth (1872)14 M.I.A.585. See also T.L.L. (1908)pp.24-26, Mayne p.74 for other cases.

(4) Encyclopaedia Americana Vol.8 p.337.

English text of antiquity, namely, that of legal memory, is not applicable.⁽¹⁾ According to the view established in the Calcutta High Court a valid custom ought to have been established before the year 1773 if in Calcutta and before 1793 if in the mofussil of the province.⁽²⁾ Otherwise under the Śāstra a usage may be considered to be immemorial⁽³⁾ if it is more than a hundred years old.⁽⁴⁾

Continuity being another essential of a custom it is evident that a custom is capable of being destroyed by disuetude: want of continuity brings the new custom within the span of the legal memory⁽⁵⁾ or raises an inference that the custom never had a legal existence.⁽⁶⁾ But a breach of custom in a particular instance will not destroy the same. In Blackstone's archaic terminology it is the interruption of the 'right' and not merely of 'possession' that destroys a custom; for instance, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed even if they do not exercise their right for ten years: it only makes it more difficult to prove that the custom does exist.⁽⁷⁾

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- (1) Mt. Subhani v. Nawak I.L.R. (1941) Lah. 154 P.C.; see T.L.L. (1908) pp. 26-27 for the explanation of the phrase 'legal memory'; see also Chitty's note no. 11 to Blackstone Vol. I. p. 71 for the expression 'the memory of man'.
 - (2) T.L.L. (1908) pp. 27-28.
 - (3) For this expression see Umrihanath Chowdri v. Goureenath (1870) 13 M.I.A. 542 at 549.
 - (4) Mit. on Yaj. II 27 pp. 139-40.
 - (5) Blackstone Vol. I. p. 71.
 - (6) Mayne p. 69. for destruction of custom see T.L.L. (1908) pp. 30-31.
 - (7) Blackstone Vol. I. p. 71.

The desideratum of certainty makes it impossible for a vague or an ambiguous custom to be recognised and enforced by the Courts. Consequentially customs like choosing the worthiest son to be an heir to the property⁽¹⁾ or appointing the wisest person to be the headman of a village panchayat will not be recognised by the Court since it is impossible to select 'the worthiest son' or 'the wisest person'.

Lastly, for a custom to be valid it must not be unreasonable though it may, in some cases, be far from being reasonable. Thus a custom that no man should put his cattle into the common till the third of October would be valid although no reason can be shown why the day should not be the second or fourth of October. But a custom that no man put in his beasts till the lord of manor put in his, is unreasonable, and, therefore, bad; for perchance the lord will never put in his and the tenants will lose all their profits. So although lack of reason in favour of a custom does not impeach its validity a strong reason against it does.⁽²⁾ That is why customs which are immoral, opposed to public policy or repugnant to the enacted law will not be recognised by Courts.⁽³⁾

The onus of proving a particular custom lies on the person who asserts it. The standard of proof required in such case would depend upon whether the alleged custom merely supplements the general law or stands in derogation from the same; in the latter case stronger

(1) Ibid. Vol.I.p.72.

(2) Blackstone Vol.I.p.72.

(3) Mayne P.66.

evidence in favour of the custom would be required.⁽¹⁾ A custom may be proved by particular instances or by general evidence of the members of the family, tribe etc., as the case may be, who would naturally be cognisant of the existence of such custom; but when a custom is being repeatedly brought to the notice of the Court it may be held to have been 'introduced into the law' whereafter it may be recognised without proof in subsequent cases.⁽²⁾ A custom which is proved to have been existing in derogation ~~from~~ the general law should be construed strictly and should not be allowed to extend, by process of analogy, beyond the sphere which is strictly proved to have been covered by the same.⁽³⁾

It is now necessary to determine the meaning of the term 'customary law' a loose use of which has made the term devoid of any precise legal sense. Authors of both the historical and the analytical schools agree that before the sovereign-made law or any other written law came into existence, there already existed a large body of rules which regulated the relation between an individual and another individual as well as between an individual and society. According to the historical school this bulk of unwritten laws constitute what is termed 'customary law' which was known to, and controlled by, a privileged minority constituting a particular caste, a priestly tribe or a sacerdotal college etc. as the case may be.⁽⁴⁾

(1) Ibid.

(2) Mayne p.66; for proof of custom see ss.10,32,35,48 and of The Indian Evidence Act, 1872 discussed in Rattigan's Digest of customary Law Chap.I.

(3) Blackstone Vol.I.p.73.

(4) Maine: Ancient Law pp.12-13.

On the other hand, according to Austin, customary law is 'positive law fashioned by judicial decisions upon pre-existing customs'⁽¹⁾ or, in other words, it contains only those customs which have been recognised by the Courts. Commenting that Austin himself uses the terms positive law and customary law in a confusing manner Sripati Roy explains the term law as being 'composed of a large body of rules observed by communities, evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a Sovereign authority. It forms the ground-work of every system of legislation.'⁽²⁾ This definition or rather explanation which follows the tenor of the historical school makes only an obscure distinction between an individual custom and customary law; for, according to the same, 'customary law' would be nothing more than an aggregate of all possibly imaginable customs; in such case the expression becomes so vast and unmeaningful as to be capable of being defined only by its contents. Hence it is proposed that the expression 'customary law' should be used to denote one particular system of law which, as opposed to the general law, comprises the total body of rules governing a particular caste, community or locality. This would distinguish the term from a mere individual custom on the one hand and the written laws on the other and would, at the same time, guard the term against acquiring a hazy abstract meaning. In the modern world the expression would help us to distinguish between a complete system of law which stands side by

(1) Austin Vol.I.p.148.

(2) T.L.L.(1908)p.11.

side with, and in derogation from, the general law. Thus the law governing succession, marriage, guardianship etc. amongst the different systems of the customary law of India should better be substituted by the words customary laws of India; for in India there are several customary laws, namely, the Marumakkattayam law, the Aliyasantana law, the Punjab customary law etc.

With regard to customs and customary laws relating to a Hindu woman's separate property it is proposed to divide this chapter into three parts, namely,

(I) The special provisions of Hindu law and customary law concerning the property of prostitutes and other profligate women.

(II) The different systems of customary laws like the Marumakkattayam law etc.

(III) The different customs which are followed in particular tribes, communities or areas and are recorded by eminent authors like Steele, Borradaile, Thurston etc. some of whom made a personal, and some a semi-official, attempt to ascertain the unwritten laws of a particular tract or community.⁽¹⁾

Before turning to other customs and customary law it would be interesting to note the special provisions of Hindu law with respect to profligate women and their proprietary rights. Like other ancient law-givers of the world⁽²⁾ the Hindu Śāstrakāras always treated profligate women as being segregated from the rest of women-folk. On the one hand, they failed to claim the respect and

(1) For individual customs which have been brought to the notice of the Court and have been held to be proved or not proved see supra pp. 148, 264, 418, 428-29, 441, 459, 562-63.

(2) For a comparative development of the law about prostitution in other countries see *The Law of Prostitution and the Law*.

honour which chaste women could, in the eyes of the law, claim; on the other, they enjoyed some special privileges which were denied to chaste and respectable women. The cause of such distinction was obvious: whereas an ordinary respectable woman was under the control either of her father, husband or son, a profligate woman, by the very reason of her profligacy and - in most cases - of her economic independence, could hardly be controlled by any of these persons.⁽¹⁾ As a result of this the responsibility of these persons to look after their unchaste female relatives decreased with the comparative increase in the responsibility of such women to look after themselves. Thus whereas a respectable woman could not be summoned to a Court, prostitutes and other profligate and degraded women had to present themselves before a judicial authority for the purpose of defending themselves in proceedings against them.⁽²⁾ Similarly the husband of an ordinary respectable woman was usually not liable to pay the debts contracted by her;⁽³⁾ but the husband, if he was an actor, a wine-merchant or a launderer - in fact any person who depended for his livelihood upon clandestine prostitution of his wife, had to pay the debts contracted by his wife.⁽⁴⁾ A respectable married woman was

(1) See the introduction.

(2) See Mit.on Yaj.II.5 Nir.edi.p.117 wherein two anonymous verses are quoted. See also Vi.Mi.39 wherein Mitra Miśra quotes the same two verses and asserts that this distinction between respectable and other kinds of women depends upon their dependence or independence respectively. See also Vi.Ta.41-42. For the regulations and enactments recognising some special privileges of respectable women see *Davies & Co. v. Mrs. M.H. Middleton*, *Seventeen Reports* vol. 9 p. 407.

(3) Yaj.II.46 etc. See supra pp.59-60.

(4) Yaj.2.48 The reason is that the wives of these people earned money for the family by clandestine prostitution - See the word 'tadadhīnakutumbinyah' in the verse quoted in the Mit. on Yaj.2.5; the words 'Yasmādvṛittistadāśrayā' in Yaj.2.48; the word 'ātmopajīviṣu' in Manu 8.362 commented upon in Mit.on

fined even for talking to a forbidden person; but wives of the above-mentioned persons were specifically excluded from these provisions of the penal law which dealt with illicit connection between men and women.⁽¹⁾ Having noticed that the Śāstra always made a broad distinction between respectable women and profligate women we now proceed to consider the special provisions, if any, of the Śāstra concerning different categories of profligate women and their proprietary capacity.

For the purpose of our survey prostitutes must be distinguished from other unchaste women, the distinguishing feature of the former class being sexual laxity in consideration for prompt money from the customers.⁽²⁾ They existed and do exist as a separate class

Yaj.2.285; the word 'gūdhājīvāh' in Kau.2.48 (Gaṇapati Śāstri's edi.p.305; Nārāyaṇa quoted in Vardhamāna's Daṇḍaviveka p.158 etc. The reason why these women carried on underground prostitution may be two-fold: they wanted to avoid the special tax which was levied upon the prostitutes in some parts of India during a particular period (see infra 515), or the adverse attitude of the Śāstra which was getting increasingly deprecatory towards immoral connections between men and women might have driven underground the bulk of the prostitute class - See infra. Similar things are happening or have happened in other countries also - See infra pp. 699.

- (1) See Mit.on Yaj.2.285 wherein Vijñāneśvara relies on Manu 8.362; Vi.Mi.401, Vi.Ta.801 etc.
- (2) In the Shorter Oxford Dictionary prostitution has been defined in relation to women as 'the offering of the body to indiscriminate lewdness for hire.' The English law accepts a similar interpretation. See infra. The various rules given in the Śāstra for payment and nonpayment (of) fee (śulka) of a prostitute support the conclusion that the laxity in morals on contractual basis for money was a distinctive feature of her class. See also sec.2(f) of The Suppression of Immoral Traffic in Women and Girls Act (104 of 1956): "prostitution" means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or kind;" For the adverse effect of this recent enactment see infra.

recognised by the society.⁽¹⁾

As in other countries of the world - ancient or modern - prostitutes have existed in India since ancient times.⁽²⁾ A few references in the Vedas and the Brāhamaṇas unmistakably point out that even in those days prostitution was the main occupation of some women.⁽³⁾ The provisions in the Arthaśāstra of Kauṭilya clearly show that by the third century B.C. prostitutes had acquired recognition from the law as a separate class of the society.⁽⁴⁾ Amongst the several officers mentioned by Kauṭilya for different departments of the government ^{there} was one called 'gaṇikādhyaṅkṣa' or the officer for the prostitutes.⁽⁵⁾ The very fact that Kauṭilya had to create or recognise a special post of 'gaṇikādhyaṅkṣa' to be on equal par with the officers in charge of the military, exchequer etc. evidently shows that prostitution was carried on, in those days, on a blatantly large scale.⁽⁶⁾ The profession appears to have had been so lucrative that the gaṇikādhyaṅkṣa was to take one thousand silver coins from a woman to 'make' her a prostitute (gaṇikā).⁽⁷⁾ From the authority and the power given to this officer it appears that in ancient India, as in

(1) See infra p.518.

(2) For comparative systems see *Encyc. Britannica* Vol. 18 pp. 596-601.

(3) See *Mahārāṣṭrīya Jñānaśāstra* (1926) Vol. 20 (Va p.283). For references in classical sanskrit literature see Ludwik Sternbach: *Gaṇikāvr̥ttasaṅgraha*. See also *Binckham* pp. 33, 34, 63, 85, 149.

(4) *Kau.* 2.48.

(5) *Ibid.*

(6) For other officers see the second *adhikaraṇa* of the *Arthaśāstra*.

(7) The provision applied to a woman whether she was a member of a family of traditional prostitutes or not: "Gaṇikādhyaṅkṣo gaṇikānvayāmagāṇikānvayāṃ vā rūpayauvanaśilpasampannāṃ sahasraṇa gaṇikāṃ kārāyet" - *ibid.*

ancient Greece,⁽¹⁾ prostitution was something like a state monopoly and formed one of the departments of the government like defence, commerce, finance etc. From the fact that the king used to accept taxes for prostitution as also from the fact that the king used to give as a mark of royal favour a life-time pension to a prostitute specially skilled in arts etc.⁽²⁾ it appears that the profession was not looked upon as that of the mean and the degraded.

Kauṭilya includes in the term prostitutes (gaṇikā) also wives of actors, dancers, musicians etc. who were apparently married women but practised clandestine prostitution.⁽³⁾ The secrecy of the profession of these women was probably devised more to evade the taxes than to avoid public censure.

Vātsyāyana in his Kāmasūtras gives nine categories of Veśyās or prostitutes but he seems to intermix in the word 'veśyā' both prostitutes and other unchaste women like concubines etc.⁽⁴⁾ However, his commentator Yaśodhara adds that the categories which consist of real prostitutes are more well known but that the rest of them have been included only on account of similarity.⁽⁵⁾ Vātsyāyana openly states that all these women should be enjoyed according to

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- (1) See *infra* pp. 515-516. The gaṇikādhyaṅkṣa had a right to prevent a prostitute from wasting her property - see *infra*. According to who preceded Medhātithi it was the duty of the king to protect prostitutes and their property - Medh. on Manu 8.28 (Jha's edi. p. 85).
- (2) Kau. 2.48 (Gaṇapati Śāstri's edi. p. 305).
- (3) Kau. 2.48 p. 305.: "Etena naṭanartakagāyakaṇvādaka....saubhikach-āraṇastrīvyavahāriṇaṃ striyo gūḍhājīvēścha vyākhyātāh/".
- (4) Ka. Su. 6.6.4 (Chaukhamba Sanskrit Series edi. p. 327).
- (5) He refers to kumbhadāsi, rūpājīvē and gaṇikā as being well known but the first one also is not a 'prostitute'.

suitability⁽¹⁾ which means that even according to the Kāmasāstra neither becoming a prostitute nor visiting a prostitute was a censurable thing.

The attitude of the dharmaśāstra towards prostitutes is not so lenient. Vijñāneśvara, however, does recognise prostitutes as a separate fifth class of the society and as different ab initio from the other four castes.⁽²⁾ Denying that prostitutes are something like Kuṇḍa or Golaka i.e. persons who do not share the caste of their parents because of the illicit nature of the connection between their parents⁽³⁾ he further argues on the authority of the Skandapurāṇa that from time immemorial this caste of prostitutes has been born of prostitutes by their connection with men of equal or superior caste⁽⁴⁾ and that having sexual relations with men forms the means of subsis-

(1) Ka.Su.6.6.55. See also Nelson p.143.

(2) See the Skandapurāṇa : "Pañchachūdā nāma kāschanāpsarasastat-santatirveśyākhyā pañcamī jātiḥ" quoted in Mit.on Yaj.2.290 and Vi.Ta.808; also cited in Sarna Moyee v. Secretary of State (1897)25 Cal.254, Hirralal v. Tripura charan (1913)40 Cal.650 at 672, Ram Pargash v. Mt.Dahan Bibi Pat.H.C.cases (1924)85 at 96; see also infra pp.561-3 for the cases in which this position is assumed.

(3) For an explanation of Kuṇḍa and golaka see Medh.on Manu 3.174; Smr.Cha. Śrāddhakāṇḍa p.180. But according to Mit.on Yaj. 2.129 the son called 'gūḍhaja' takes the caste of his parents as it is not possible to determine the caste of his putative father.

(4) Even the prostitutes cannot have sexual relations with a person of a caste lower than that of themselves - Mit.on Yaj.2.190 wherein Na.Sam.12.78 is discussed; Vi.Ta.808.

tence for this caste.⁽¹⁾

He further says that the prostitutes thus being free from any injunction of the Śāstra which could have confined them to one person, incur no fault, and have no punishment, according to the religious or the secular law respectively.⁽²⁾ But the position of the men visiting prostitutes is different. Although they do not commit any offence according to the positive law they incur fault according to the religious law and have to undergo a ceremony of atonement;⁽³⁾ for according to the Dharmaśāstra a man is supposed to have sexual connection only with his own wife.⁽⁴⁾

But notwithstanding the prohibition about visiting prostitutes which was laid down by the religious part of the Dharmaśāstra it is evident that there would be some persons who would disregard

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- (1) Mit.on Yaj.2.290: "Ato veśyākhyā kāchiḥjātiranādirveśyāyāmutkriṣṭajātersamānajātervā puruṣādutpannā puruṣasambhogavṛittirveśhyā iti brāhmaṇyādivallokaprasiddhibalādabhyupagamanīyam/"; also Vi.Ta.808. Here Vijñāneśvara says that 'veśyātva' like 'brāhmaṇya etc.' is definable by what is known to public. But commenting on Yaj.1.90 he says that castes like Brāhmaṇa etc. are defined, unlike the species of other animals, only on the authority of the Śāstra. The former explanation was probably inevitable for him since excepting the solitary extract from the Skandapurāṇa he could not produce any extract from the Śāstra to prove that the prostitutes form a separate class of the society.
- (2) Mit.on Yaj.2.290: "Atastāsām niyatapuruṣapariṇayanavidhividhuratayā samānotkriṣṭajātipurūṣābhigamane nādrīṣṭadoṣo nāpi daṇḍaḥ.../"
- (3) Mit.on Yaj.2.290: "Tāsu chānavaruddhāsu gachchatām puruṣāṇām yadyapi na daṇḍastathāpyadrīṣṭadoṣo astyeva. Svadārāniyatassadā iti niyamāt". For atonement for visiting prostitutes etc. see also Mit.on Yaj.1.81; Yama and Samvarta quoted in Mit.on Yaj.3.288; Bṛihasamvarta, Āpastamba and Uśanas quoted in Mit.on Yaj.3.265 p.429; Śūlapāṇi's Prāyaśchitta-viveka (with Tattvārtha-Kaumudī of Govindānanda) pp.365-66; Vi.Mi.402; Vi.Ta.808; Smṛiti-Muktāvali (prāyaśchitta kāṇḍa) of Vaidyanātha pp. 888-89 etc.
- (4) Manu 3.45; Manu 9.101; Yaj.1.81 etc.

the precepts of the Śāstra and would have some relations with prostitutes. That the positive Dharmaśāstra could ill-afford to neglect such situation is evident from the special provisions given by Yājñavalkya and Nārada who prescribe certain rules about money-transactions between prostitutes and their customers.⁽¹⁾ Thus notwithstanding the ethical attitude of the Śāstra it is evident that prostitutes did collect some money and did possess some property of their own. Obviously this money must have been treated as their strīdhana since, except during the days of Kauṭilya, there was no person who was authorised to control prostitutes in enjoyment or disposition of their property.⁽²⁾

What could be the nature of succession to their property?

No adequate answer to this question has been found in the Śāstra and the reason is manifest: the rules given for succession to male's⁽³⁾

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- (1) Yaj.2.292; an anonymous verse quoted in Mit.on Yaj.2.291; Na. Smr.9.18-19 & Na.Sam.7.20-21; Vyāsa quoted in Smr.Cha.750 and Vi.Mf.402; Matsyapurāṇa quoted in Vi.Ta.654-55, Vi.Chi.120 etc.
- (2) A prostitute's property is her strīdhana - for cases see infra. But during Kauṭilya's days when prostitution was a state monopoly it seems that the gaṇikādhyaṅkṣa had a right to control the extravagance of a prostitute; the latter moreover was not allowed to place her ornaments etc. into the hands of anybody else except her mother. Similar restrictions were placed on disbursement of property by a prostitute's son etc. See Kau.2.44, Gaṇapati Śāstri's edi.Vol.I.302: "Niṣkṛayachaturviṃśatisaḥasro gaṇikāyāḥ. Dvādaśasāhasro gaṇikāputrasya. ...Bhogāṃ dāyamāyaṃ vyayamāyatīm cha gaṇikāyā nibandhayet. Ativyayakarma cha vārayet. Mātrihastādanyatrābharāṇanyāse sapādachatuśpaṇo daṇḍaḥ" From the last clause it is evident that the mother acted as a manager of the family and controlled its finance. A superannuated harlot was promoted to become a brothel-keeper and then she controlled the family as a manageress of the same - ibid p.302; Saubhāgyabhāṅge mātrikāṃ kuryāt/"
- (3) Yaj.2.117; Yaj.2.135-36; see the words "sarvavarṇeṣvayaṃ vidhiḥ" in the latter verse.

or female's⁽¹⁾ property presumably applied to the persons of the four varṇas or castes and not to prostitutes who, being a fifth class, apparently followed their own customs and usages in any matter of succession concerning the property of persons of their class. It is only Kauṭilya who gives some special rules of succession to a prostitute's property. He says that in case a recognised prostitute is dead or goes abroad her daughter or sister should represent her, or her mother should get appointed in her place another prostitute.⁽²⁾ It may be inferred that the same persons must take the property and responsibility of a deceased prostitute.⁽³⁾ Although the other authors do not give special rules of succession to prostitute's property it is not difficult to infer them from the sociological position of a prostitute's family. In her family a prostitute would naturally be the manageress since the other persons whether male or female would depend for livelihood upon her income.⁽⁴⁾ This inference is also substantiated by the fact that the prostitutes who camouflaged themselves as married women had substantial control over the finance of their families.⁽⁵⁾ In a case where two prostitutes exist in the same family the mother or the senior one would naturally be the

(1) Yaj.2.144-45. The importance given to the father and his sapinḍas and the husband and his sapinḍas in these lines of succession apparently appears to repudiate a suggestion that these provisions apply also to a prostitute's property. But see *infra*.

(2) Kau.2.44 (Vol.I.301): "Niṣpatitāpretayo duhitā bhaginī vā kuṭumbam bharet/ Tanmātā vā pratigaṇikām sthāpayet/".

(3) The translation of the passage mentioned just above (given by Shama Sastri in his edition of the work) supports this inference

(4) For the text see *supra* pp.513-14.

(5) See *supra*-p.1bid.

manageress whereas the daughter or the other junior females would be subordinate to the manageress but superior to the rest of the members of the family.⁽¹⁾ From the provisions of the Arthaśāstra it seems that in those days a prostitute daughter was supposed to place all her ornaments in the hands of her mother. She was fined if she placed them in somebody else's hands. Similarly she was fined also if she sold or mortgaged her own property.⁽²⁾ These provisions go to show that a prostitute family in those days bore a close resemblance to a joint Hindu family with this much difference that instead of a senior male member a senior female member was the manageress of the family. Thus the sociological structure of a prostitute family was that which is found in a matriarchial society and was nearer to the framework of the Malabar families following Marumakkattayam law.⁽³⁾ Even in the present age a prostitute family can hardly be otherwise than the one which used to exist in Kauṭilya's days.

There can be no doubt that because of the matriarchial structure of a prostitute's family succession to her property, during the days of Kauṭilya, must have been matrilineal one. As for the later age it is true that although Vijñāneśvara gives special provisions for succession to property of a male who is a celebrate student, a hermit, an ascetic⁽⁴⁾ or a foreign merchant⁽⁵⁾ he does not give special provisions for succession to prostitute's property.

(1) See supra p.519.

(2) See—supra—p. Ibid.

(3) For this customary law see infra pp.577-92.

(4) Mit.on Yaj.2.137.

(5) Mit.on Yaj.2.264.

But a casual glance at the line of succession given in the Mitākṣarā for a married woman's strīdhana would prove that it is pre-eminently matrilineal in all cases except śulka.⁽¹⁾ Now a prostitute did not and cannot stand any chance of making śulka (bride-price) as a part of her strīdhana; hence there was no reason why Vijñāneśvara should have laid down special provisions for succession to a prostitute's property. Of course, it would have been better if he had endorsed that the same line of succession is applicable also to prostitute's strīdhana. It need not, however, be supposed that this omission to make special provisions for prostitute's property is a serious mistake on the part of Devaṇṇa, Nīlakaṇṭha and other authors who, as regards succession to some categories of strīdhana, admit sons along with daughters; for almost all these provisions refer to property gained after marriage and property given by the husband; the prostitutes were presumably incapable of having either of these two categories of strīdhana.⁽²⁾ On the part of Jīmūta, however, this omission might be thought as a serious mistake since according to him such order applies to general strīdhana except a few categories like yautaka etc.⁽³⁾

But the case of a married woman who becomes a prostitute or of a prostitute who becomes a married woman, or, to go still further, the case of a prostitute who becomes a married woman and then again resumes her original profession, is a very intricate one - the Śāstra in fact could hardly anticipate a case like this. Accord-

(1) For the order see supra.

(2) For these various lines of succession see supra pp. 353, 363 etc.

(3) For the order of succession see supra pp. 376-77. For an inequitable result this omission can bring about see infra p.

ing to the opinion of Vijñāneśvara a married woman of one of the four varṇas who indulges in prostitution does not thereby reduce herself to a prostitute who can be so by birth only.⁽¹⁾ Although such a woman can evade the punitive provisions of the positive law she does not escape the provisions of the religious law and has to atone for her profligacy.⁽²⁾ A prostitute's case is entirely different. So it is evident that by whatever profligacy a married woman of one of the four varṇas does not become a prostitute but remains an unchaste and, in some cases, a degraded woman.⁽³⁾

A prostitute on the other hand, is a person who is not expected to marry.⁽⁴⁾ But once she voluntarily renounces her freedom and goes into the fold of married life there is no reason why she should not have the same privileges and disabilities which belong to other married women. This conclusion is arrived at with the help of some other analogical provisions about prostitutes. When a common prostitute becomes a concubine of a particular person she gains the status of a concubine which is nearer to the status of a wife.⁽⁵⁾ Accordingly the fine which can be imposed upon a man for having illicit connection with married women and concubines (but not

(1) See supra p.518 note.1.

(2) Mit.on Yaj.2.290: "Svairiṇyādīnāṃ punardaṇḍābhāvo vidhānābhāvāt. Prāyaścittam tu svadharmaskhalananimittam gamyānāṃ cha gant-rīnāṃ chāviśeṣādbhavatyeva/", "Tathāhi svairiṇyo dāsyascha tāvadvarṇastriya eva/"; Vi.Ta.808.

(3) Mit.on Yaj.2.290: "Ataḥ puruṣāntaropabhoge tāsāṃ ninditakarmābhyāsena pātityāt/".

(4) Ibid on p.287: "...niyatapurūṣapariṇayanavidhividhuratayā..".

(5) See infra pp.525-26.

for having similar connection with a common prostitute) can also be imposed upon a man who is having such a connection with a prostitute who has already become a concubine of another person.⁽¹⁾ If a prostitute, by voluntarily renouncing in favour of a particular man her freedom to have connection with any and many persons, acquires the status of a concubine there is no reason why a prostitute who has voluntarily renounced all such freedom by marrying a particular person should not be treated as an ordinary married woman at least so long as she is under coverture.

But the case of such prostitute married woman returning to her original calling before or after the death of her husband is a very intricate one. On the one hand, it is difficult to see how a prostitute, once she has, by her marriage, made herself bereft of her freedom, can have the means of legally regaining the same. Apparently at least it seems that her freedom is irretrievably lost. But on the other hand it has already been seen that those married women who practice clandestine prostitution are treated by the Śāstra as prostitutes.⁽²⁾ Moreover although a prostitute ceases, by her marriage, to be a prostitute by profession she does not cease to be a prostitute by caste; for a woman cannot change her caste by marriage. Thus as a compromise between these two positions it may be suggested that a married prostitute who indulges merely in a milder type of profligacy like becoming a concubine of another person etc. should be treated only as an unchaste married woman and

(1) Mit. on Yaj. 2.290 p.286: "...chaśabdādveśyāsvairiṇīnāpī sādharmaṇāstrīṇāṃ bhujīśyānāṃ cha grahaṇam//".

(2) Supra pp. 513-14.

not as a prostitute, but that if she indulges in prostitution and earns money thereby she should be treated only as a prostitute and not as an unchaste married woman; for earning one's own money and becoming thereby the supporter of the family is one of the two things - the other being caste - which distinguish prostitutes from other profligate women.

A concubine ought to be distinguished from a prostitute whether the former establishes illicit connection with her paramour before or after her marriage. Right from the time of Medhātithi the commentators have always recognised the position of a paramour as being that of a secondary or virtual husband.⁽¹⁾ Yājñavalkya prescribes punishment for those who try to establish sexual intimacy with somebody else's concubine.⁽²⁾ Nārada says that by establishing such intimacy with somebody else's concubine a person incurs the same fault which he would have incurred by having such intimacy with somebody else's wife.⁽³⁾ Vijñāneśvara and Mitra Miśra fully endorse the position taken by Nārada.⁽⁴⁾ Hence it must not be forgotten that a

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- (1) See the word 'upapatitva' in Medh.on Manu 3.174; Devaṇṇa says that a paramour is equal to a secondary husband if he actually stays with his concubine - Smr.Cha.(śrāddhakāṇḍa)p.179. It is to be noted that a concubine has a similar semi-official position in the Burmese customary law - see infra p.607, 613. She is called 'inferior wife'.
- (2) Yaj.2.290 and Mit.on the same; see also Manu 8.363 and the commentaries on the same; Vi.Mi.401; Vi.Ta.808; Nārāyaṇa quoted in Vardhamāna's Daṇḍaviveka p.159.
- (3) See comments of Bhavasvāmi on the words "...doṣaḥ syāt paradāra-vat..." occurring in Na.Sam.12.79.
- (4) Mit.on Yaj.2.290: "paraparigṛhītātvena paradāratulyatvāt"; Vi. Mi.401: "tāsāṃ paraparigṛhītātvena parastrītulyatvāt"; etc. Here the words 'paradāra' and 'parastrī' definitely denote somebody else's wife. But see the chapter 'Atha paradārābhimarṣaṇa-daṇḍa' in the Daṇḍaviveka wherein punitive sanctions against illicit connections between men and women are elaborately given. On p.154 the author says: "Tatra paradārapadena svabhāryāvyatiriktā strī vivakṣitā/ Sā cha dvividhā pariṇītā aparīṇītā cheti/..

concubine is almost equal to a wife in Hindu law and must not be confused with a prostitute. The only difference between a wife and a concubine will probably be that a wife (patnī), as expressed by Pāṇini, is entitled to associate herself with her husband for the purpose of performance of a sacrifice whereas a concubine is not.⁽¹⁾

Succession to the property of a concubine whose relation with her paramour has not been adulterous is not very difficult to determine. If she was unmarried before she became a concubine her property should be treated as that of a married woman; if she was married and widowed before she became a concubine of another person her property should be treated as that of a remarried widow. But it is evident that the rule that every Hindu marriage is presumed to have been celebrated in an approved form⁽³⁾ cannot be applied to this fictional marriage. In the case of a concubine who is having an adulterous relation with her paramour it is very difficult to decide the relative predominance of the conflicting rights of her husband and paramour. On the one hand it seems that the connection she establishes by her marriage with her husband is an unending life-long connection which cannot be broken at the instance of either spouse;⁽⁴⁾ on the other, it seems that the husband's status of being a husband depends upon the fulfilment of his duty to maintain

¶1) Pan.4.1.33: "Patiyurno yajñasamyoge" referred in Vis.on Yaj. 1.69, Mit.on Yaj.2.135-36 at p.217, Medh.on Manu 3.174, Smr. Cha.674 etc.

(2) Amongst Śūdras continuous concubinage is equal to marriage - see supra, p. 455-556.

(3) See supra pp. 456-57.

(4) Manu 9.46 and 9.101; see also introduction.

his own wife⁽¹⁾ and that if somebody else maintains his wife that person comes into the shoes of the husband and gains and exclusively retains all the rights which previously belonged to the husband. But according to the Śāstra the husband is bound to maintain even his degraded or adulterous wife;⁽²⁾ so from a legal point of view there appears to be no reason why a husband should not be able to regain control of his adulterous wife who has become a concubine of another person and to maintain her as his own wife. Since the real husband is thus in a position to destroy the rights of a secondary husband and to retrieve his own supremacy at any time it appears that he has a legal preponderance over a paramour. From this point of view succession to the strīdhana of a concubine who is a childless adulteress at the time of her death, should devolve upon her husband and his sapinḍas in preference to her paramour. On the other hand the question may, in exceptional cases, be viewed also on the basis of equity and not purely of law.⁽³⁾ Accordingly in determining succession to such concubine's property questions of fact like the cause of her desertion, the proportion between the duration of her marital life and of her illicit relations etc. may be taken into consideration. Thus if the husband has deserted his wife without any reason and has refused to maintain her as a result of which she clinged to some other person; or if the duration of her marital life

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- (1) Ma.Bha.1.104.30: "Bhāryāyā bhraṇāt bhartā pālanāchcha patiḥ smṛitah/". See introduction. This economic aspect cannot be disregarded in judging whether, and to what extent, the wife is under the control of her husband. Even in England the wife became 'discovert' by the operation of the Married Woman's Property Act of 1882 - see Stroud vol. I. p. 832. Als. supra p. 284.
- (2) See infra p. 537.
- (3) For equitable considerations admissible in Hindu law see supra pp. 18-19.

is utterly insignificant in proportion with the duration of her concubinage, then there appears to be no reason why in succession to her strīdhana her paramour should not be preferred to her husband and his sapinḍas.

As for succession inter se amongst children born to such an adulterous concubine from her husband and from her paramour respectively it has already been stated that her legitimate heirs of a particular class should be preferred to illegitimate heirs of the same class.⁽¹⁾ This rule should be followed, of course, subject to the exception mentioned by Manu whereby the property given to such woman by her husband and paramour devolves upon their own children exclusively.⁽²⁾

The property of all unchaste women except prostitutes should devolve according to the general rules of succession to strīdhana. But as, on the basis of unchastity and the consequential religious degradation, a line has been drawn in some cases between ordinary women and unchaste women it is necessary to examine in particular the Śāstric law on the subject.⁽³⁾ While considering this aspect of Hindu law on which abrupt, hasty and in many cases erroneous opinions have been expressed by the leading Hindu law scholars, the three questions that arise are:-

(1) See supra pp. 427-30.

(2) Manu IX-191 supra pp. 327-28.

(3) For degradation from higher caste to lower caste see Manu 10.43-45; Harivaṃśa chapter 14 & Chap. 12.123; Ram Pargash v. Dahan Bibi Pat.H.C. cases (1924) 85 at 96. According to Ārya Samājists it seems that both degradation and elevation in caste is possible - see Prāyaścittavichāra of Inderjit p.19: "Śūdro brāhmaṇatāmaiti brāhmaṇaśchāpi śūdratām/".

- (1) What are the causes of degradation?
- (2) What are the after-effects of degradation?
- (3) Whether degradation amounts to civil death?

Yājñavalkya says that a person goes into degradation either by not following what is enjoined upon him by the Śāstra or by doing what is prohibited to him.⁽¹⁾ To avoid the religious and secular ill-effects of his misbehaviour a person has to undergo 'prāyaśchitta' which denotes an occasional ceremony of expiation done for the purpose of destroying sin and appeasing the public in general.⁽²⁾ Thus it is sin (pātaka) which is at the basis of all degradation and etymologically sin denotes that which brings about the fall of a person.⁽³⁾ A very broad definition of the word degraded (patita), it seems, would include all those who have committed some sin.⁽⁴⁾ The Śāstra, however, divides sins into several categories in accordance with the graveness of misbehaviour and its after-effects. These categories have different names like mahāpātakas, upapātakas etc.. The authors of the Śāstra try to state exhaustively and discuss

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- (1) Yaj.3.219: "Vihitasyānanuṣṭhān^{na}ninditasya cha sevanāt/ Anigrahāchhendriyāṇām naraḥ patānamṛichchhati/". See also Manu 11.44.
 - (2) Yaj.3.220: "Tasmātteneha kartavyam prāyaśchittam viśuddhaye/ Evemasyāntarātma lokaśchaiva prasīdati/"; see also Manu 11.45-46 and Yaj.3.226; Mit.on Yaj.3.220: "Prāyaśchittaśabdaśchāyam pāpakṣayārthe naimittike karmāviśeṣe rūḍhaḥ/"; Bṛhaspati and Aṅgiras quoted in Vaidyanātha's Śmr.Mu. (prāyaśchittakāṇḍa) p.859.
 - (3) Mit.on Yaj.3.227 p.376: "Pātayantīti pātakāni brahmahatyādīni".
 - (4) Kulluka on Manu 11.181: "Patitaśabdo'yaṁ pāpakārivachanaḥ sakalapāpināmaviśeṣapāṭhāt/". Medhātithi's comment on this verse is unfortunately unintelligible.

elaborately these several categories of sin.⁽¹⁾ The mahāpātakas mainly include killing a brahmin, drinking wine, stealing, having illicit connection with one's own preceptor's wife and keeping contact with persons who have already done some mahāpātaka.⁽²⁾ The upapātakas include also some such insignifican things like cutting a living tree for the purpose of having some fuel.⁽³⁾ Considering the after-effects of degradation to which we shall return it is necessary to see whether all these sins can bring about degradation.

According to Nārada, Sarvajñanārāyaṇa, Rāghavānanda etc. it

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- (1) For mahāpātakas see Manu 11.54, Yaj.3.227; upapātakas - Manu 11.59-66, Yaj.3.234-42; Jātibhramśakaras - Manu 11.67; saṅkar-
īkaras - Manu 11.68; apātrīkaras - Manu 11.69; malāvahas -
Manu 11.70-71. See also Mit.on Yaj.3.290 wherein sin is divided
into five categories. The divisions seem to be overlapping ones
for Vijñāneśvara mentions also jātibhramśakara which is not
mentioned in these five categories - Mit.on Yaj.3.242 p.383.
For these different categories of sins see also Hemādri's
Chaturvargachintāmaṇi vol.4 p.3, Śūlapāṇi's Pra.Vi. with Ta.Kau.
pp.36-45, Kāśinātha's Prāyaścittenduśekhara pp.2-4, Vaidyanātha
Smr.Mu.(pra.ka.)p.862. This is a place to note that one of the
upapātakas for a man is living on a woman's strīdhana or making
one's own wife a prostitute for one's livelihood. - See the
word 'stryājīvaḥ' in Manu 11.63 on which Medhātithi comments:-
"Strīṇāmājīvaḥ striyamupajīvyate strīdhanena kuṭumbadhāraṇam
Kriyate vā veśastriprayojanam vā/". See also the words
'strīhimsauśadhajīvanam' in Yaj.3.240 and comments to the same
effect in Mit.p.382 and Ma.Pa.856. For expiation of this sin
see the Pra.She.(of Kāśinātha)p.22. Thus there was a secular
(see Manu 9.200 supra) as well as a religious sanction against
people who tried to snatch women's property. Actors, dancers
who habitually lived on the earnings of their wives' prostitu-
tion must have been considered degraded as a class and it is no
wonder that their families were treated as on a par with the
prostitute families.
- (2) Manu 9.235 & 11.54; Yaj.3.227 etc.
- (3) Manu 11.64; Yaj.3.240 and Mit.on the same.

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seems that a person becomes patita only ^{by} mahāpātaka. ⁽¹⁾ On the other hand according to Kullūka, Viśveśvara, Mitra Miśra and others, all persons who have committed some sin, whether a mahāpātaka or upapātaka etc. become degraded. ⁽²⁾ This opinion appears to be a later development in the field of law; for quoting a text from the Brahmapurāṇa which explains the word 'patita' as a person who commits mahāpātaka, Mitra Miśra comments that even persons who commit

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- (1) See Na.Smr.16.21 & Na.Sam.14.20 wherein 'patita' and 'aupapātika' have been separately mentioned amongst persons incapable of having inheritance. Sar. on Manu 9.20; Kullūka and Rag. on Manu 11.182-84 (for the word 'chaturbhiḥ' used by Rag. see Manu 9.235). The word 'aupapātika' denotes a person who has done some upapātaka - see Apa.on Yaj.II.140; the author of the Prakāśa mentioned in Vi.Ra.489; Da.Ta.21; Da.Kra.Sam.30. See also the readings 'apapātrita' and 'apayātrita' instead of 'aupapatika' in Vi.Ra.489 and Vi.Ta.431-32 respectively. For the significance and explanation of these readings see Bhattacharya: T.L.L.1884-85 pp.399-400.
- (2) Kullūka on Manu 11.181; Ma.Pa.pp.964 & 966 wherein the author states that the ceremonies of excommunication and rehabilitation are applicable to mahāpātakins et cetera; the Brahmapurāṇa cited and comments of Mitra Miśra on the same in Vi.Mi. (Suddhiprakāśa) p.56 etc. The comments of Kullūka here are contrary to his remarks on Manu 11.182 (supra); it appears, however, that according to him the ceremonies mentioned in Manu 11.182, which have a semblance with funeral ceremonies, should be performed in the case of a person who is degraded because of any sin other than a mahāpātaka. Similarly in Vi. Mi.(Vya.Pra.)559 Mitra Miśra seems to include in degraded persons only mahāpātakins. This is, of course, an inference but this apparent, though not definite, contradiction between his two statements in two different volumes may give at least a weak support to the theory that all the volumes of the Vīramitrodaya have not been written by one and the same person. Pandit V.L.Joshi informs me that the recent notion amongst the paṇḍits was that degradation could be brought about only by any one of the mahāpātakas; but the opinion has to be rejected with respect since it has not been borne out by the Śāstric evidence on the subject. The trend of the Śāstra appears to be exactly the reverse. According to Vasiṣṭha 2.13 and Atri 5.22 even eating onions, garlic etc. is a cause of immediate 'fall' for a brahmin. This strict sociological prohibition does appear to have softened down till the dawn of the twentieth century.

atipāṭaka, anupāṭaka etc. are included in the term.⁽¹⁾ Thus it seems that the mahāpāṭakins (persons who commit mahapāṭaka) were "abominable" from ancient days⁽²⁾ but that the persons who committed lesser types of sin also began to share the unenviable fate of the mahāpāṭakins.

Vijñāneśvara appears to make a compromise between these two views and says whereas a mahāpāṭaka brings about immediate degradation⁽³⁾ other smaller pāṭakas bring about degradation only by repetition⁽⁴⁾ and that the quantum of such repetitive action required for degradation depends upon the respective sin and its heinousness.⁽⁵⁾

(1) Vi.Mi.(śuddhiprakāśa) 56 supra.

(2) See Manu 9.238-39 which gives provisions of excommunication specially for the mahāpāṭakins who are mentioned in Manu 9.235. For general provisions of excommunication see infra p. 535. Even a king cannot accept fine from a mahāpāṭakin - Manu 9.243 and the commentaries on the same. But for an imaginary provision to the same effect fantastically alleged by their Lordships of the Calcutta High Court and Banerjee to have been laid down in the Arthaśāstra see infra pp. 574-75.

(3) See the remark in Mit.on Yaj.3.232-33 p.380 : "Etāni..... mahāpāṭakātideśaviṣayāṇi sadyaḥpatanahetutvāt pāṭakānyuchyante/".

(4) Mit.on Yaj.3.234-42 p.384 : "Yadyapi mahāpāṭakeṣviva sadyaḥpātityahetutvaṃ nāsti tathāpyabhyāsāpekṣayā pātityahetutvam-aviruddham/".

(5) Mit.on Yaj.3.234-42 p.384 : "Yāvatyabhyasyamāne mahāpāṭakatulyatvaṃ bhavati tāvānabhyāsaḥ pātityahetuḥ/".

It must be remembered that keeping contact with a degraded person is itself a cause of degradation so that ^{the} relatives of a degraded person who live with him will themselves become degraded. (1)

The law about sins and the consequential degradation does not make much distinction between men and women. Those acts and omissions which are declared to be sinful in the case of a man are mutatis mutadis sinful in the case of a woman. (2) But women have to perform only one-half of the prāyaśchitta prescribed for men. (3) Women, however, have some special modes of sin and degradation. They are: having sexual relation with a man of lower caste, causing

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- (1) Manu XI.180; Yaj.3.261; Devala and Parāśara quoted in Mit.on Yaj.3.261 etc. Commenting on this verse Vijñāneśvara says that a person remaining in contact with a sinner of a particular category has to undergo the same prāyaśchitta as the sinner himself. For prāyaśchitta for such contact (saṃsarga) see Manu 181; Gautama quoted in Mit.on Yaj.3.292; Mit.on Yaj.3.294 at p.467; Pra.Vi.(with Ta.Kau.)pp.165-74; Pra.Kadamba pp.205-6; Pra.Nirūpaṇa pp.109-114 etc. Vaidyanātha maintains, on the authority of Parāśara, 1.25 that in Kaliyuga contact cannot by itself be a cause of degradation and that it is only the sinner himself who is liable to be degraded. This opinion is wholly adverse to the ratio of the decisions in the old cases in which the relatives of the proposita who stayed with her were preferred to the relatives who did not stay with her. - See Smr. Mu.(pra.ka.)898. But without referring to Vaidyanātha's name another eminent author Śaṅkara Bhaṭṭa vehemently and very elaborately attacks this view and on the whole he appears to be correct. - See the Dharmadvaitanirṇaya pp.131-32.
- (2) Medh.on Manu 11.188; Śaunaka quoted in Mit.on Yaj.3.261 p.415; Mit.on Yaj.3.297 etc.
- (3) Medh., Rag., and Kullūka on Manu 11.176; Āṅgiras, Viṣṇu and Sumantu discussed in Mit.on Yaj.3.243 p.287; Mit.on Yaj.3.258 p.406; Pra.She.81 etc. But the rule is not applicable to expiation for adultery - see Ma.Pa.861-62; Pra.Vi.361 etc. The basis for this rule is that the Śāstra does make some concessions in performing the ceremonies of expiation and that the nature of such concessions depends upon the place and time of the performance, the age and the capacity of the performer etc.

abortion, killing one's own husband⁽¹⁾ etc.

As a married woman is enjoined by the Śāstra to be devoted to her husband⁽²⁾ there can be no doubt that adultery on her part is a sin.⁽³⁾ But the Śāstra does not seem to contain any provision whereby fornication is declared to be a sin on the part of a maiden. Even as regards adultery it seems that it is a pardonable sin which is presumed to be washed away by appearance of menstruation. Yājñavalkya says that a woman is to be discarded only if she starts carrying as a result of her adultery and that otherwise her sin is presumed to be washed away by the appearance of menstruation.⁽⁴⁾ This is an important point to be remembered in deciding whether a woman goes into degradation by her adultery which is nevertheless an expiable offence.⁽⁵⁾

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- (1) Yaj.3.297; see also Medh.on Manu 11.188; Hemādri's Chaturvarga-chintāmaṇi vol.4 p.666-68 containing special section under the heading "Strīṇām viśeṣāṇi patanīyāṇi"; Smr.Cha.576-580: "Tyājy-astriṇīviśayāṇi"; Ma.Pa.668: "Strīṇām viśeṣapatanahetavaḥ".
- (2) See Manu III.19, III.30, V.154, V.156-7, V.160, V.164 etc.
- (3) Adultery is termed by the Śāstra as 'vybhichāra' for the texts about which see Smr.Cha.576-580 etc. The prāyaścitta for adulterous women is the same as the one prescribed for men having intercourse with somebody else's wife - Manu 11.176.
- (4) Yaj.1.72. See also Parāśara 10.10 & 10.26 for such valid desertion and automatic purification respectively. That the tendency of the Śāstra was to get stricter towards women can be seen by comparing the commentaries on the verse: whereas Viśvarūpa gives a natural meaning to the above verse of Yājñavalkya, Vijñāneśvara and Aparārka says that this purification refers only to mental and not to physical adultery. But see Manu 5.108 which supports these later commentators. For a compromise between the two views see the Chaturviṃśati quoted in Smr.Mu. (pra.ka.)893.
- (5) For prāyaścitta see Manu 11.176-77; Pra.Vi.(with Ta.Kau.)365-66; Pra.Ka.134; Chaturviṃśati, Uśanas and Saṃvarta quoted in Smr.Mu.893-94. But the Jains seem to have a stricter attitude - see Surendrakīrti's Prāyaścitta p.58: "Parapuruṣatā nārī yāvajjīvaṃ na śuddhyati/".

The after-effects of sin and its consequential degradation are two-fold: religious and secular. From the religious point of view a sinning person goes to hell and has to undergo some sort of punishment in accordance with the seriousness of his sin. He has also to suffer in his next birth the ill-effects of the sins which he has committed in his previous birth.⁽¹⁾ From a religio-secular point of view the relatives of a degraded person have to perform a ceremony of ex-communication which is very similar to obsequial ceremonies and to cut off all contact with him.⁽²⁾ The śāstra is so strict about this severance that all those who keep contacts with a patita themselves become patita.⁽³⁾ There is no funeral ceremony or āśaucha for those persons who are degraded before their death.⁽⁴⁾ Even mourning for their death is forbidden.⁽⁵⁾

From the point of view of positive law the effect of degradation is apparently two-fold. Firstly a degraded person and his descendants born after his degradation lose their share in the joint

(1) Manu 11.49-52; Yaj.3.221-225.

(2) Manu 11.182-84: "Patitasyodakam kāryam sapinḍairbāndhavairbah-ih/ Nindite'hani sāyānhe jñātrītviggurusannidhau// Dāsī ghaṭa-mapāmpūrṇam paryasyetpretavatpadā / Ahorātramupāsīrannaśauchan bāndhavaissaha// Nivarteran cha tasmāttu sambhāṣaṇasahāsane/ Dāyādyasya pradānam cha yātrā chaiva hi laukikī//"; Yaj.3.294; Ma.Pa.964 etc; Nir.Sin.(Neneśāstri's edi.)1959-60; Pr. etc.

(3) See supra pp.530

(4) No 'kriyā' for a patita - Yama quoted in Mit.on Yaj.3.6 p.298; no sūtika - Kṛiṣṇāchārya's Smr.Mu.p.16; no ghavyahavya' - Giridharalāla's Smr.Sa.Samuchchaya p.29; no āśaucha - the Tīkā on Nir.Sin.1907. This is especially so in the case of a woman who causes abortion or kills her own husband - Manu 5.90 & Yaj.3.6. But this does not denote that degradation is equal to civil death (see infra); for there is no āśaucha even for the King's death - Manu 5.97.

(5) Mit.on Yaj.3.6 p.299.

family property and their right to inherit the property of their undegraded relatives. ⁽¹⁾ According to Baudhāyana, Kauṭilya and

- (1) Apa,2.14.1; Hi.2.7; Va.Smr.7.46; Vi.Smr.15.32; Kau.3.5; Śaṅkha quoted by Apa.on Yaj.2.116; Manu 9.201; Yaj.2.140; Na.Smr.16.21 & Na.Sam.14.20 etc. This is a place to note a few irresponsible statements which K.K.Bhattacharya has made in his T.L.L.1884-85. Firstly, he says that "This law of exclusion is peculiar to the Hindu system"; secondly, he remarks that this inclusion of degraded persons into the list of disqualified persons is a later addition of the Brahmins. The first statement proceeds out of ignorance (see infra pp.551-52^{original} and T.L.L.1883 p.282) whereas the second one^{original} from reluctance to realise that such inclusion has been made since the days of the oldest of the dharmasūtras of Āpastamba. In his enthusiasm for something original he makes another objectionable statement, namely, that exclusion on account of degradation had already become obsolete by the time of Śrīkṛṣṇa. For his support he relies on the commentary of Śrīkṛṣṇa on Da.Bha.1.31. This statement needs special refutation as it was meekly accepted by their Lordships of the Madras High Court in Subbaraya v. Ramasami (1899)23 Mad.171 at 176. In this particular paragraph Jīmūta says that like death and renunciation, degradation results in destruction of ownership. Commenting on this Rāmabhadra points out that as there are provisions whereby a patita is enjoined to make a gift of cow etc. in a sacrifice and whereby there is also a prohibition against accepting gifts from a degraded person, degradation does not destroy ownership. (Rāmabhadra's point may be understood when it is remembered that a right to make gift denotes also its prerequisite, namely, the ownership of the donor in the property to be given away - see Mit.on Yaj.II.27 p.141: "Svasvatvanivṛtitiḥ parasvatvāpādānaṃ cha dānaṃ"). Catching this very point Achyuta says that a degraded person loses his ownership only if he is averse to making expiation. Śrīkṛṣṇa simply endorses Achyuta's opinion as follows: "Atra patitasyāpi sarvasvadānād-īprāyaśchittaśṛavaṇāt prāyaśchittaparāṇmukheti viśeṣaṇaṃ deyaṃ tena prāyaśchittaprāgabhāvābhāvasahakṛitaṃ pātityaṃ svatvanāś-aheturiti bodhyaṃ". This position is accepted on all hands. See infra pp.540. So an inescapable corollary of this statement will be that if such person refuses to perform the prāyaśchitta he loses his ownership according to the Bengal school and his share on account of suspension of ownership according to the Mitākṣarā school. - See infra pp.537-40. See Vi.Mi.559 wherein a similar remark together with the corollary is given. Bhattacharya's statement is, therefore, baseless.

Devala who are followed by all the commentators the degraded person and his descendants cannot claim even maintenance from the joint property.⁽¹⁾ The latter rule, however, does not appear to apply to degraded person's daughter who, after some technical and insignificant ceremony of expiation and purification, can be taken back into the original fold of the family for the purpose of social intercourse and marriage.⁽²⁾ The progeny of a degraded person referred to here is the progeny born to him after his degradation.⁽³⁾

A special provision of the Śāstra in favour of women ought to be noted here, namely, it is obligatory for the responsible person to provide, even for degraded women, residence near the family house and maintenance.⁽⁴⁾ The reason of this provision is clear enough: in a majority of cases women being incapable of earning their own livelihood, complete severance from their own families is more likely to bring about further degradation by compelling them to resort, for their own subsistence, to vicious company.⁽⁵⁾

The second legal effect of degradation, according to some authors, is that the degraded person is divested of his property and the latter devolves upon his heirs in the same way as if he has died. It is well-known that the joint-family property can be partitioned at the father's will during his life-time and at the will of the sons

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- (1) Bau.2.2.46; Kau.3.5; Devala quoted in Śr.^mCha.632, Vi.Ra.490, Sa.Vi.366, Vi.Mi.559, Vi.Ta.436 etc.
 (2) Yaj.3.261 and Vṛiddhahārīta and Vasiṣṭha quoted in Mit.on the same; Ma.Pa.850; Pra.Vi.174; Nri.Pra.256; Pra.Nirūpaṇa 113-14.
 (3) Vi.Smr.15.34-35; Smr.Cha.633; Sa.Vi.365 etc.
 (4) Manu 11.188; Yaj.3.296.
 (5) See Sarvajñanārāyaṇa on Manu 11.188.

after his death.⁽¹⁾ Commenting on Nārada's verse⁽²⁾ which gives other alternative circumstances for partition during the life-time of the father Vijñāneśvara says that sons can force partition upon the father if he leads a sinful life (adharmavartini).⁽³⁾ Commenting upon the same verse Jīmūta gives two alternative circumstances as follows:- One is when the father has lost his ownership in the property by degradation, renunciation or death; second is if the father is willing to partition the property during his life-time.⁽⁴⁾ Viśveśvara and Mitra Miśra also admit that degradation of the father is a reason whereby a son can compel his father to partition the joint family property.⁽⁵⁾ It is most important to note that the line of succession known as compact series of heirs which is applicable to the property of a person who has died without leaving any issue,

(1) Yaj.2.115 & 2.117.

(2) Na.Smr.16.3 & Na.Sam.14.3.

(3) Mit.on Yaj.2.114 p.201, Ma.Pa.645, Smr.Cha.605 containing comments on Na.Smr.16.16.

(4) See the discussion in Da.Bha.1.32-50 with the assertion in para. no.44: "Tasmāt patitatvanisprīhatvoparamaiḥ svatvāpagama ityekaḥ kālo 'paraścha sati satve tadichchhāta iti kāladvayameva yuktam/". See also ibid para.no.40. But see Da.Ta.9 and Da.Kra.Sam.42-43 wherein the authors seem to have neglected the suggestion of their master that the father loses by his degradation his ownership in the property: they state that father's own will is the only circumstance whereby there can be a partition, during the life-time of the father, of his self-acquired property as distinguished from the ancestral property. But see Raghunandana infra p.540 note 1. The principle of destruction of ownership as enunciated by Jīmūta has been only conditionally accepted by his followers - Supra p.536 note 1. On the other hand according to the Mitākṣarā School the father loses only his right to withhold partition and his ownership is only suspended but not totally destroyed - infra p.540.

(5) Ma.Pa.648; Vi.Mi.435.

is also applicable, according to Mitra Miśra, to the property of a person who has become degraded or has renounced the world.⁽¹⁾ This appears to show that a degraded person is dead not only to the world but also to his wife, daughter and other relatives and that he loses all his rights in his property which he has acquired before degradation.

But this inference does not appear to be correct. If Mitra Miśra thereby wants to suggest divesting of property he is contradicting not only other leading authors but himself too. For Viññāneśvara, Viśveśvara and Mitra Miśra himself say that the provision about incapacity to take a share at partition applies only to those persons who suffer from the requisite disqualification before and at the time of the partition but not to those who have already taken their share and have become separate.⁽²⁾ The reason, Mitra Miśra himself adds, is that "there is no authority for divesting of (an already) given share."⁽³⁾ Raghunandana appears to be the only author who directly contradicts this position. Admitting that disqualified persons other than a degraded one are not divested of their share if they acquire their disqualification only after the partition he

(1) Vi.Mi.488: "Gaṇamukhyaputrābhāve mṛitapatitaparivrājakādīdh-anagrahaṇādhikāriṇa uchyante."

(2) Mit.on Yaj.2.140: "Eteṣāṃ vibhāgāt prāgeva doṣaprāptāvanamśa-tvamupapannaṃ na punarvibhaktasya/"; Ma.Pa.682; Vi.Mi.559. There appears to be a printing mistake in the passage: "Sarve-ṣāmaṃśānarhāṇām ... anamśā eva/" in Ma.Pa.682 which is reprinted in Dha.Ko.1394. The editors of the latter have not corrected the text of the passage but have added a comma which makes the confusion worst confounded. The word 'vibhakto' therein must be read as 'vibhakte' or 'vibhaktau' though the latter one would be slightly far-fetched. The suggestion would be amply clear if this passage is compared with the above-cited Mitākṣarā passage of which the former is almost a copy.

(3) Vi.Mi.559: 'dattavibhāgāpaharaṇaṃ pramāṇābhāvāt'.

further remarks that a degraded person, however, is divested of his share even if he becomes degraded after the partition. Adducing the provisions of the Śāstra about prohibition of accepting gifts from a degraded person he further states that by degradation only that much ownership of a person which was accrued to him before his degradation is destroyed but that he does acquire ownership in property which he acquires after degradation.⁽¹⁾ The opinion which is worth considering has, however, to be discarded in favour of the opinion of the multitude of authors who are against it.

Moreover - and this is more important for our purpose - Vijñāneśvara, Viśveśvara, Nīlakaṇṭha, Kamalākara, Mitra Miśra and Śrīkṛiṣṇa maintain that if, after the partition, any one of these disqualified heirs gets relieved of his disqualification he is entitled to a share in the same way as a son born after the partition.⁽²⁾ Viśveśvara specially includes amongst such heirs a degraded person who has undergone prāyaścitta.⁽³⁾ This shows that by degradation the ownership of a person or his right to inherit is not destroyed ^{at least} but only suspended according at least to the authors of the Mitākṣarā School.

✓ We thus come to three conclusions as regards the Śāstric position about the proprietary right of a degraded person: firstly, a person who is degraded does not get a share at a partition of the joint family property and does not succeed to the property of his undegraded relatives; secondly, a degraded person, once he has

(1) Raghunandana on Da.Bha.5.7.

(2) Mit.on Yaj.2.140; Ma.Pa.682; Ma.Ra.355-56; Vya.Ma.163; Vi.Ta.432; Vi.Mi.559; Śrīkṛiṣṇa on Da.Bha.5.10.

(3) See 'kṛitaprāyaścitto vā' in Ma.Pa.682.

secured a share in partition, cannot be divested of his property; thirdly, a degraded person is, after the performance of due expiatory ceremonies, entitled to his share in ^{the} property which he would have taken had he not been degraded at the time when the partition took place. The only acceptable conclusion, therefore, which could be drawn from the remark of Mitra Miśra which is contradictory to this position⁽¹⁾ is that the property of a degraded person devolves upon the same heirs upon whom it would have devolved if he had not been degraded at the time of his death. This is also fortified by the fact that although there is a provision debarring a degraded person from inheriting the property of his undegraded relative's property there is no provision debarring an undegraded relative from inheriting his degraded relative's property. The only part of Raghunandana's commentary which is conformable with the above position is that even a degraded person is capable of acquiring and owning property after his degradation.

It may be added here that the same ^r seasons which disqualify a man from having a share in inheritance disqualify a woman also;⁽²⁾ so the position stated above is equally applicable to degraded women.

We now come to the third important question partly answered in the negative by the foregoing discussion, namely, whether degradation amounts to civil death? The scholars and the judges who introduced into Hindu law this doctrine of civil death have evidently adopted this fiction of death from the old English law according to

(1) i.e. no divesting on account of post-partition defect.

(2) Mit.on Yaj.2.140; Ma.Pa.682; Vi.Mi.559.

which death could be mors civilis or mors naturalis. Under the common law a man could be said to be civilly dead (civiliter mortuus) if he was attainted of treason or felony or if he was banished or abjured the realm. He lost all his existing property and also his right to acquire and retain new property.⁽¹⁾ In *Bullock v. Dodds*⁽²⁾ Abbott C.J. characteristically puts the position of an attainted person as follows: "He may acquire; but he cannot retain; he may acquire not by the reason of any capacity in himself, but because if a gift be made to him, the donor cannot make his act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the Crown by its prerogative, there being no other person in whom it can vest".⁽³⁾

There appears to be a remarkable concurrence of opinion amongst the indigenous as well as European scholars that degradation in effect amounts to civil death in Hindu law. Sir Thomas Strange picturesquely describes in the following words the effects of degradation: "Accompanied with certain ceremonies, its effect is, to

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- (1) See Wharton's Law Lexicone (1938)p.197; W.J.Byrne: A dictionary of English law (1923)p.278. The forfeiture Act 1870(33 & 34 Vict.C.23) provides that conviction for treason and felony etc. shall not involve any attainder, forfeiture or escheat - Wharton p.197. The doctrine of mors civilis, though abolished may be applicable if a person is outlawed; outlawry, though theoretically possible in criminal proceeding, was abolished in civil proceedings by the Civil Procedure Acts Repeal Act 1879 sect.3 - Byrne p.278.
- (2) (1819)2 Barnwell and Alderson 256 reprinted in English Reports Vol.106.
- (3) 2 B.& Ald.258 at 275 - also quoted with approval by Sir J.Dodson in *Coombes v. The Queen's Proctor* 16 Jur.820 at 821. The learned judge also refers to the opinion of Spelman, approved also by Blackstone, to the effect that the derivation and meaning of the word 'felony' implies forfeiture of property. While the husband is undergoing sentence for felony the wife was regarded as a widow or a wife divorced a vinculo matrimonii - ibid at p.821. See also 2 B.& Ald.258 at 268-69 where Manning

(Continued on the next page)

exclude him from all social intercourse, to suspend him in every civil function, to disqualify him for all the offices, and all the charities of life; - he is to be deserted by his connexions, who are from the moment of the sentence attaching upon him, to 'desist from speaking to him, from sitting in his company, from delivering to him any inherited, or other property, and from every civil or usual attention, as inviting him on the first day of the year or the like' - So that a man under these circumstances, might as well be dead; which indeed, the Hindu law considers him to be, directing libations to be offered to Manes, as though he were naturally so."⁽¹⁾ Other eminent scholars like Jolly, Sarvadhikari, Golapchandra Sarkar etc. follow this and hold that degradation brings about civil death.⁽²⁾

It must at the time be noted that almost all these scholars also maintain that a degraded person cannot be divested of an already given share⁽³⁾ and some also accept the provisions of Vijñāneśvara that if the defect is removed even after the partition, the disqualified person is entitled to a share in the manner of an after-

in his argument refers to statutes, Yearbooks and to the opinions of Bracton, Lord Hold etc. to prove the proprietary effects of civil death.

- (1) Strange (1830)p.160.
- (2) Jolly: T.L.L.1883 pp.175, 277-79; Sarvadhikari T.L.L.1880 p.969: "To all intents and purposes the disqualified person is viewed in the eye of law as dead; .."; Sarkar (1927)p.585: "... an out-caste or an excommunicated sinner is deemed civilly dead.." & p.587.
- (3) Strange p.163; Cowell T.L.L.1871 p.184-85; Jolly: T.L.L.1883 p.279; Grady H.L.(1868) pp.100-1; Ram Charan Mitra: T.L.L. 1895-96 p.323 etc. But see Shamachurn Sirkar: Vya Da.(1867) p.1017 quoted infra p.544. Jolly is self-contradictory when at p.175 he remarks: "... one formally expelled from caste by the ceremony of Ghaṭasphoṭa 'the smashing of the pot', is divested of his entire property."

born son. (1)

On the authority of a very old case Sheonauth Rai v. Mussumaut Dayamyee Chowdrain (2) which was decided in the Bengal Sudder Court in the year 1814 scholars like Shamachurn Sirkar, Cowell and apparently Sir Thomas Strange (3) also maintain that there are two kinds of sins or offences; some cause partial and temporary degradation which, together with its incidental hindrance to succession, is removed by expiation; others cause a final and irreparable degradation resulting in a permanent hindrance to succession, and in excommunication - in such a case expiation may remove the sin but it is alleged to leave irredeemable the loss of caste and the forfeiture of ^{the} right to inherit. In this particular case an adoptive mother had made an application to the Court to get her adopted son disinherited. The son was a drunkard, had attacked many people, had tried to destroy the adoptive mother and co-habited with a muslim woman. Distinguishing between the two kinds of sins in the above-mentioned manner the pandits of the Sudder Court opined that only the last

(1) Jolly T.L.L.1883 p.279; Bhattacharya T.L.L.1884-85 pp.396-97; opinion of Bhalachandra Sastri expressed in his edition of Steele's Law and Custom of Hindu Castes p.55 referred to in W.B.4th edi.p.56; see also Steele (1868)p.61: a disqualified person is excluded "unless the defect can be removed by medicaments or penance." But as against this see Sarvadhikari: T.L.L.1880p.968. Jolly at p.279 adds "but they give no clue as to the way in which this analogy has to be worked out."

(2) (1814)2 Mad.Rep.137.

(3) The case is referred to in Strange vol.I.161-62; Sirkar's Vya. Da.(1867)pp.1001-2 & 1017-18, Cowell : T.L.L.1871 p.186. Sirkar at p.1017 remarks: "The person committing a crime or a sin which causes degradation by loss of caste unredeemable by atonement, forfeits property whenever the same is committed, and cannot regain inheritibility even by expiatory penance."

offence was of such a kind as to make the adopted son permanently bereft of his caste and of his right to inherit. The Court ungrudgingly accepted their finding and decided the case accordingly. This position which superimposes the idea of civil death upon Hindu law is utterly baseless; it neglects completely the fundamental purposes for which a *prāyaścitta* is performed, namely purification of mind and appeasement of the public; ⁽¹⁾ the latter is evidently borne in mind with a view to avert the evil effects of excommunication. Moreover immediately after mentioning the provisions of excommunication Manu and Yājñavalkya mention also the provisions of rehabilitation of an excommunicated person if he performs *prāyaścitta*. ⁽²⁾ From these provisions it is definite that such person completely retrieves his original position. It cannot be said that these provisions of rehabilitation apply only to a person who has been degraded on account of a lesser type of sin; for Viśveśvara says that these provisions apply even to a *mahāpāta*kin who has performed expiation. ⁽³⁾ Kamalākara, an author of great authority, in his *Nirṇayasindhu* states that funeral ceremonies are to be performed and *āśauca* is to be observed after the death of a degraded relative who had performed *prāyaścitta* before his own death. ⁽⁴⁾

Moreover even a person who did not perform expiation was not totally severed from his nearest relatives. Baudhāyana, Vasiṣṭha,

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- (1) Yaj.3.220; the other etymological definitions of *prāyaścitta* stress either of these purposes - see Hārīta quoted in Pra.Ka.1; Āṅgīras quoted in Pra.Vi.2 & the Dharmadīpikā 71; Pāraskara quoted in the Dharmadīpikā 71; Gurudāsa's *Prāyaścittasamuchchaya* 109; for its meaning both according to yoga and rūḍhi see Smr.Mu.(pra.ka.)859.
- (2) Manu 11.186-87: "...Sarvāṇi jñātikāryāṇi yathāpūrvam samācharet." See also Vas.Smr.15.12 and Yaj.3.295.
- (3) Ma.Pa.966.
- (4) Nir.Sin.(Nene's edi.)pp.:936-37.

Śaṅkha and Śātātapa affirm that there can be no severance from a degraded mother.⁽¹⁾ Kamalākara says that if he is a nearer relative like father etc. the ceremony of Nārāyaṇabali is to be performed.⁽²⁾ He also says that obsequial ceremonies may be performed, out of compassion, for degraded relatives.⁽³⁾ Thus excommunication in toto is impossible in the case of nearest relatives and it is definitely wiped out by performance of expiation.

Moreover, leaving aside sins like having cohabitation with a Muslim woman etc. which cannot be much more grievous than the offence of having connection with a prostitute or a woman of the lowest class, even apostasy does not bring about permanent excommunication so as to bring about the civil death of the apostate who, in view of the Śāstra, is nothing more than a patita. Long since the days of the Brāhmaṇas and the Āryanyakas a special ceremony called 'vrātyaṣṭoma' was performed for converting the non-Aryan aboriginals

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- (1) See Bau.II.2.48, Vas.Smr.13.47, Śaṅkha & Likhita quoted in Apa. on Yaj.2.237 - all referred to by Kane: History of Dharmaśāstra Vol.III.p.803; see also Śātātapa quoted in Medh.on Manu 8.389.
- (2) Ibid. However, it is only the author of the Sarasvatī-Vilāsa who openly ventures to say that the relation between the father and son being secular (laukika) it becomes severed upon degradation (of either) - Sa.Vi.365: "Pitāputrasambandho laukikaḥ pātityādaḥ nivartata iti purastānnivedayiṣyate." Strangely, however, none of the leading scholars who vociferously maintain that degradation is equal to civil death, have come across this passage. The present writer was unable to trace any section in the same treatise wherein this passage has been explained by the author in detail as he here promises. The statement, however, cannot apply to the relation between a mother and her issue which is natural and not only social. - See also the Matsyapurāṇa quoted in the Śabdakalpadruma vol.3p.24 cited in Hiralal v. Tripura Charan (1913)40 Cal.650 at 672-73.
- (3) Nir.Sin.1935.

or for purifying the renegade Aryans themselves.⁽¹⁾ Even during the days of the British regime the Hindu pandits were getting in favour of readmitting into Hindu fold a Hindu who got himself converted to another religion but wished to come back again into the Hindu fold.⁽²⁾ It is thus evident that the Śāstra never contemplated any such thing as permanent degradation or excommunication.

Thus we arrive at the following conclusions:-

- (1) That degradation does not result in civil death.
- (2) That degradation does not sever the relation with the nearest kinsmen and cannot bring about permanent excommunication.
- (3) That the only adverse effect of degradation from the proprietary point of view is that the degraded person and his male children born after his degradation lose all their rights of partition and inheritance pertaining to the joint property of the family or separate property of their undegraded relations.
- (4) That a degraded person continues, even after his degradation, to hold the property which he has acquired before his degradation and is capable of acquiring new property after his fall.
- (5) That the effect of excommunication can be dislodged by proper penance in which case the person is restored to his normal status.
- (6) That a degraded person who has undergone expiation is entitled to a share in partition in the like manner of an after-born son.

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- (1) For the probable theories of conversion of non-Aryan aborigines into Aryans by a ceremony called Vrātyaṣṭoma see Stanley Rice: Hindu Customs and their origins (1937) pp.87-90; see also N.C. Sen-Gupta p.35. For the expiatory ceremony for renegade Aryans see the Vrātyaprāyaśchitta mentioned in Pra.Nirūpaṇa of Ripuñjaya p.131.
 - (2) See 'Mlechchhīkṛi(bhū)tānām śuddhivyavasthā' compiled by Gaṅgārāma at the orders of Raṇavīrasimha, the king of Jammu and Kaśmīra.

(7) That succession to property of a degraded person is the same as succession to the property of an undegraded person.

The main proprietary effect of degradation, namely, exclusion from inheritance has long since been wiped out since the passing of the Caste Disabilities Removal Act⁽¹⁾ Sect.No.1 of which reads: "So much of law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by the Royal Charter within the said territories." The Act relieves a person against deprivation of caste as well as change of religion or exclusion from religion. It certainly helps any person who is excluded from inheritance by reason of his degradation and consequent excommunication. But it has always been held that the relief given by this enactment is personal and that the descendants of an apostate cannot enjoy the benefits conferred by the provisions of this Act.⁽²⁾ However, the Śāstra does not recognise any such thing as conversion to other religion; hence an apostate could have been excluded under the Śāstra only on the ground that he had become patita. So the decisions about the descendants of apostates can be applied by way of analogy to the descendants of a degraded and excommunicated person also. But it would be wrong to hold that des-

(1) Act XXI of 1850 which extended the principle underlined in section 9, Regulation VII of 1832 Bengal Code to all the territories subject to the Government of the East India Company.

(2) See the cases cited in Gupte H.L.p.53.

cendants of a degraded person cannot benefit under this Act; for the sons etc. of a degraded person are excluded from inheritance not simply because it would be unreasonable to allow them to claim through a person who is himself excluded but because, as Jīmūta and Mitra Miśra clearly put it, they themselves also become patita.⁽¹⁾ Their degradation may be the result of their being born to a degraded person or of their social intercourse with a degraded person like father etc. But their degradation being also personal they should be held to be entitled to claim benefit under this enactment.⁽²⁾ The same rule obviously applies to descendants of apostates. It is high time that the ~~judicial~~ law on this point was rectified and placed on its proper footing.⁽³⁾

If not degradation there were some other reasons whereby in ancient days women, it seems, could be divested of their strīdhana. The oldest authority for this is found in Kauṭilya's Arthaśāstra wherein the author says that a woman loses all her dominion over her

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- (1) Da.Bha.5.12; Vi.Mi.559 : "patitotpannatvena patitatvāt".
- (2) But see Sarkar p.581 wherein the author maintains that the descendants of an outcaste born after excommunication of their ancestor, cannot claim benefit under this Act as an outcaste falls outside the pale of Hinduism and Hindu law does not apply to him. The reasoning is obscure; in any case the learned scholar has failed to notice that the disqualification of the descendants of an outcaste depends also upon their personal degradation.
- (3) As rules of exclusion are the same in succession to a male's or a female's property The Hindu Inheritance (Removal of Disabilities) Act XII of 1928 must also be noted. In consequence of this Act which applies only to persons of the Mitākṣarā School no person other than a congenital lunatic or an idiot is excluded from inheritance by the reason only of a disease, deformity or physical or mental defect.

strīdhana by seditious activities or by revolting against her husband.⁽¹⁾ A famous and an oft-quoted verse of Kātyāyana reads: "A woman does not deserve strīdhana if she indulges in harmful activities, or is shameless, a spendthrift, or an adulteress."⁽²⁾ Quoting this verse Medhātithi says that such kind of woman should not be given any gift on supersession, or if she already possesses some property she should be divested of the same.⁽³⁾ Unfortunately this verse is not quoted at all by either of the two leading commentators, namely, Vijñāneśvara or Jīmūta. Others who refer to the same either leave it without any comment or connect it only to gift on supersession.⁽⁴⁾ Only according to Mitra Miśra does this text provide reasons both for exclusion from inheritance and divesting of an already vested property.⁽⁵⁾ But on the whole, however, it seems that the attitude of the law developed towards softening the provisions of divesting of strīdhana and

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- (1) Kau.3.3: "Rājadvīṣṭātichārābhyāṃ ātmāpakramaṇena cha/ Strīdhanānītaśulkānāṃ asvāmyaṃ jāyate striyāḥ//" The word 'ātmāpakramaṇena' is explained in the Śrīmūlā as deserting of one's own accord one's own husband.
- (2) "Apakārakriyāyuktā nirlajjā chārthanāsikā/ Vyabhichāraratā yā cha strīdhanam na cha sārhati//" - cited Vi.Mi.516 etc. For other readings see the appendix. For the result of extravagance see Na.Smr.15.92 & Na.Sam.13.94 'Strīdhanabhraṣṭsarvasvām etc.' wherein Nārada gives a list of women who deserve to be deserted. For deprivation of all rights because of adultery see Yaj.1.70 'Hṛitādhikārām etc.' and Mit.on the same.
- (3) Medh.on Manu 8.28 (Jha's edi.p.85) wherein the commentator takes this stand and tries to derive support from Manu 9.78. But he also mentions the opinion of other people to the effect that this verse does not provide for divesting of strīdhana which is already given but only prevents further gift of strīdhana for supersession in accordance with Yaj.II.148.
- (4) However, Kamalākara utilises this verse to prove that an unchaste widow is not entitled even to maintenance from her husband's property - Vi.Ta.398.
- (5) Vi.Mi.545 referred to supra p.514.

creating absolute ownership of a woman in her strīdhana.⁽¹⁾

With regard to the reasons of exclusion from inheritance which include extravagance on the part of an heir Colebrooke in his letter to Sir Thomas Strange observes: "In regard to the causes of disinheritance, discussed in the Digest b.V.ch.5 sec.1, corresponding with the 5th ch. of Jimuta Vahana, and the 10th sec. of ch.2 of the Mātacshara, I am not aware, that any can be said to have been abrogated, or to be obsolete. At the same time I do not think any of our Courts would go into proof of one of the brethren being addicted to vice, or profusion, or being guilty of neglect of obsequies, and duty towards ancestors. But expulsion from caste, leprosy, and similar diseases, natural deformity from birth, neutral sex, unlawful birth, resulting from an uncanonical marriage, would doubtlessly now exclude; and I apprehend, it would be to be so adjudged in our Adawlut."⁽²⁾ It need not be stressed how important these words were since they emanated from the pen of a person who was eminent both as a judge and as a Sanskrit scholar. However, Strange and Grady point out that in a society wherein individual interest is subdued to community interest it is necessary to have some measures of security against vicious extravagance of an individual member of a family.⁽³⁾ Even under Roman law a notorious prodigal was regarded as non compos; and under the old English common law

(1) See supra for the extent of woman's dominion over her property and her right to dispose of the same.

(2) Strange vol.I.159; also reproduced in Grady H.L.(1868)p.103.

(3) Strange vol.I.158; Grady p.103. Strange refers also to Col. Dig.3.300 wherein Jagannātha says that according to some authors gaming people should be excluded whereas according to others what they dissipate should reduce their share pro tanto - vol.I. 157-58.

dissipation of feuds was, by the law of feuds, a cause of forfeiture.⁽¹⁾ It is no wonder that even Hindu law adopted the same attitude towards the prodigal. What applies to an extravagant male member of a joint Hindu family applies a fortiori to a woman. An extravagant woman could be even more dangerous since she can be in possession both of her own strīdhana and household property which can be valuable.

But Colebrooke perhaps adopted a more reasonable attitude towards these texts since it was better utterly to disregard extravagance etc. as causes of exclusion from inheritance or of divesting rather than to admit them as necessarily difficult questions of fact in every case; for there can be no accepted measure of prudence whereby a person can be branded as extravagant. It may be noted here that the only reported case on strīdhana in which the text of Kātyāyana was brought to the notice of the Court, namely, *Ganga v. Ghansita*⁽²⁾ the full bench of the Allahabad High Court held, without giving any reason or reference, that the text has become obsolete and unenforceable in Courts. But taking into consideration the fact that the tendency of the Śāstra was becoming progressively in favour of creating absolute and irrevocable ownership of a woman in her strīdhana it appears that the decision was given unknowingly on the correct lines.

(1) Strange vol.I.158. "Si vassalus feudum disipaverit, aut insigni detrimento deterius fecerit, privabitur" - Zasius in Usus.Feud. 91 and Crag.de Jur. Feud.362 quoted by Wright on Tenures p.44 and referred to by Strange vol.I.158. For prodigi in Roman law see Buckland: The Main Institutions of Roman Private Law (1931)p.83; Fritz Schölz: Classical Roman Law (1951)pp.200-201; H.F.Jolowicz: Roman Foundations of Modern Law (1957)pp.125-26. The authors agree, however, that the exact position of a prodigal in Roman law cannot now be ascertained with certainty.

(2) (1875)1 All.46 F.B. See supra p.514.

Coming to the judicial decisions on succession to the property of unchaste women one finds that no distinction whatsoever was made between succession to property of a professional hereditary prostitute and of an unchaste woman who is not a prostitute. A quick glance at the facts of the following cases would prove that all profligate women, whether they were unchaste married women, concubines or hereditary dancing girls, were treated on the same basis as prostitutes. Hence all the existing ~~judicial~~ law about succession to unchaste women may not inaccurately be described as the law of succession to property of prostitutes.⁽¹⁾

✓ The foundation of this confusion between hereditary prostitutes and other degraded women was laid by the Bengal Sudder Court in Taramunee Dasee v. Motee Buneanee.⁽²⁾ The facts of the case were as follows: A married woman who later on lapsed into prostitution had died leaving three daughters. One was born in lawful wedlock, married and having children; the other two were born during the prostitution of their mother and were themselves prostitutes. The prostitute daughters stayed with their mother. To recover the maternal estate on the death of the mother her married daughter sued the other two daughters as a guardian on behalf of her minor sons. When the question was referred to the pandits of the Sudder Court they replied: "The two prostitute daughters alone inherit whatever the mother may have left; because the relation of the married and respectable daughter to the outcaste mother has been severed." The Court accepted

(1) But for exceptions see *infra* .

(2) (1846)7 Mac.Rep.325.

the opinion and accordingly gave a decision to the same effect.

Treating this decision in this case as his basis Strange (junior) in his Manual of Hindu Law has summed the law on the subject as follows⁽¹⁾:-

- I. - "The property of a dancing-girl will pass to her female issue first, and then to her male, as in the case of other females."
- II. - "On failure of issue, the property of a dancing-girl will go to the pagoda to which she is attached."
- III. - "With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in the caste, whether offspring or other, inherit from them. Their issue after their degradation succeeds."⁽²⁾

As the provisions of the Śāstra in this respect have been fully discussed three points against the decision in Taramunee's case need only be cursorily stated:-

(1) That a married woman lapsing into profligacy does not become a prostitute thereby and should not be treated as such.⁽³⁾

(2) That by degradation the tie of kinship between a mother and her offspring is never completely severed.⁽⁴⁾

(3) That between legitimate and illegitimate issue of the same class preference must be given to the former.⁽⁵⁾

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- (1) It is obvious that while relying on this decision Strange is confusing dancing girls with unchaste married women.
 - (2) Strange: Manual of H.L.p.89 - approved in Mayna Bai v. Uttaram (1864)2 M.H.C.R.196 at 202; Sivasangu v. Minal (1998)12 Mad.277. For heritable blood between a woman and her illegitimate offspring see supra pp.425.
 - (3) See Guddati Reddi v. Ganapathi (1912)23 M.L.J.493 approved in Meenakshi v. Muniandi (1914)38 Mad.1144. For the Śāstric position see supra pp.522-3.
 - (4) Supra pp.545-46.
 - (5) Supra pp.429-30.

However, since the decision in Taramunee's case there has been a difference of opinion almost upon every point concerning succession to property of unchaste women, namely, whether degradation brings about severance of the relationship with the undegraded relatives; whether customary or ordinary Hindu law is applicable in determining succession to a prostitute's property; whether a prostitute's family resembles a Hindu co-parcenary; whether a prostitute's female heirs take a limited or absolute interest in the property which they inherit from her etc.

On the question whether degradation brings about a complete severance from the undegraded relatives there have been two views. The older and the incorrect view is that degradation brings about a severance and that in succession to a degraded woman's property not only her degraded relatives but even the Crown succeeds to the total exclusion of her undegraded relatives. Accordingly a co-prostitute (and hence a degraded) sister staying jointly was preferred to a separate undegraded brother resuming caste usages,⁽¹⁾ a niece introduced into the temple as a devasasi, though not formally adopted, by the proposita was preferred to the brother of the latter who remained in caste.⁽²⁾

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- (1) Sivasangu v. Minal (1888)12 Mad.277. It was also remarked that the Act XXI of 1850 did not abrogate the rule of preference between a co-prostitute sister and a separate undegraded brother. - Report at p.284.
- (2) Narasanna v. Gangu (1889)13 Mad.133. See also In re Goods of Kamineymoney Bewah (1894)21 Cal.697 wherein the husband's sister's adopted son being undegraded was declared as being no heir and hence not entitled to apply for revocation of the probate granted to the paramour of the deceased woman who, in her will, had appointed him as an executor. See also Bhutnath Mondol v. Secretary of State for India (1906)10 C.W.N.1086 wherein the Court refused to issue letters of administration in favour of the sister's son of the deceased on the basis that the property

(continued on the next page)

Mid-way between this and the next following view is the belief that degradation brings about severance from the husband's family but not from the father's family of natural relatives.⁽¹⁾ The reason of severance from the husband's family, according to this view, is that an unchaste wife is not entitled to succeed to her husband's property or to obtain maintenance from him or his heirs and that it would be inequitable to allow the husband etc., who have no corresponding liability, to succeed to the property of a degraded woman.

On the other hand in Sarna Moyee v. Secretary of State for India⁽²⁾ it was held, notwithstanding the arguments of Golapchandra Sarkar to the contrary, that by prostitution a woman may become out-caste but she does not thereby cease to be a Hindu and that ordinary Hindu law would be applicable to her property. But as the case was decided on another point the question about severance by degradation was left open. However, observing that "It is almost impossible to construct out of the smrities and commentaries a consistent doctrine

escheated to the Crown. The exact decision in this does not appear to be correct; because it seems both the sisters were prostitutes and hence there was no question of the sister's son being undegraded; secondly, letters of administration can be granted to undegraded relatives of a degraded woman without recognising their title - see *In re Goods of Sowdaminey Dassee* decided in the Calcutta High Court on April 28th 1893 and referred to in *Kamineymoney's* case at p.702. See also *Sundari Dosee v. Nemye Charan* (1907)6 C.L.J.372.

- (1) See *Ramprasad v. Mt. Subu Bai* (1908)4 Na.L.R.31 and *Moharani v. Thakur Proshad* ()14 Oudh Cases 234 referred to in *Hiralal v. Tripura Charan* (1913)40 Cal.650 at 674-76. See also *Tripura v. Harimati* (1911)38 Cal.493; degradation severs a woman from her natural relations but not from her own sons or chaste daughters born after the degradation.
- (2) (1897)25 Cal.254.

of 'civil death' or as it has been called fiction of death,"⁽¹⁾ their Lordships of the Madras High Court held in Subbaraya v. Ramasami⁽²⁾ that degradation of a woman does not sever her tie of relationship with her husband's family and that in the absence of a preferable heir her step-son succeeds to her property. The Madras view was later on followed in the Allahabad High Court.⁽³⁾ The conflicting decisions soon brought the point before a Full Bench of the Calcutta High Court in Hiralal v. Tripura Charan.⁽⁴⁾ In that case the property in question belonged to a deceased married woman who, after her husband's death, became a 'prostitute' by staying as a mistress with some other person. The question was whether her undegraded brother's son was entitled to inherit her property. Eminent Hindu law scholars like Golapchandra Sarkar and Ghose represented the two views, namely, that degradation is equal to civil death and not equal to civil death respectively.

Referring to many of the texts mentioned in the foregoing discussion and regretting that the decision based on doubtful authority in Taramunee's⁽⁵⁾ case should subsequently have been accepted without question in some of the later cases⁽⁶⁾ their Lordships of the Full Bench gave a unanimous opinion that prostitution does not sever the tie of kindred by blood. Rejecting as baseless the statement made by Sutherland in his Synopsis of Hindu law of Adoption that an outcast person becomes civilly dead⁽⁷⁾ their Lordships overruled the decision

(1) *Infra*, Report at p.176.

(2) (1899)23 Mad.171, followed in Subbaratna v. Balakrishnaswami A.I.R.1918 Mad.642.

(3) Narain v. Tirlok (1906)29 All.4.

(4) (1913)40 Cal.650 F.B.

(5) (1846)7 Mac.Rep.375 *supra*.

(6) 40 Cal.650 at 672-73.

(7) *Ibid* at p.670.

of their High Court in Taramunee's case and the decisions that followed the same.⁽¹⁾

Scholars like Banerjee and Golapchandra Sarkar have severely criticised the decision of the Full Bench but as their criticism has been fully met in the foregoing Śāstric discussion no special attempt is necessary here to counter each one of them individually.⁽²⁾

✓ Since the decision in Hiralal's case it has been uniformly held that prostitution or degradation does not sever the tie of relationship with kindred by blood⁽³⁾ and that the same rule applies to relations by marriage.⁽⁴⁾ It has also been held that even amongst undegraded relations there can be no uniform preference to relations by blood over relations by marriage.⁽⁵⁾

In one of the later cases Venkatasubba Rao J. held that unless there is formal expulsion from the caste a woman cannot be taken to have been degraded merely on account of her unchastity.⁽⁶⁾ On the question whether an excommunicated person can give his son in adoption their Lordships of the Bombay High Court - though they

(1) For these see supra.

(2) Banerjee pp.463-67; Sarkar pp.588-89. There is no doubt some considerable force in the equitable grounds stated by Sarkar in support of his view; but equity should not be allowed to enfeeble the preponderance of the legal position in this matter. As for Banerjee it appears he himself was a party to the decision in Sarna Moyee's case - see Shaikh Taleb Ali v. Shaikh Abdul Tazack A.I.R.1925 Cal.748 at 749.

(3) Meenakshi v. Muniandi (1914)38 Mad.1144; T.S.Kothandaram v. Subbier (1926)52 M.L.J.514; Charu Bala Dasi v. Province of West Bengal A.I.R.1950 Cal.473.

(4) Subbaraya v. Ramasami (1899)23 Mad.171; Jagannath v. Narayan (1910)34 Bom.553; Kothandaram v. Subbier (1926)52 M.L.J.514. In Jagannath's case in which the husband was preferred to a son born of an adulterous intercourse the question of degradation was not discussed at all.

(5) Kothandaram v. Subbier supra.

(6) Ibid at p.516.

inadvertantly admitted that formal expulsion from caste brings about civil death, - held on the authority of Golapchandra Sarkar that it is only the most heinous kind of degradation that brings about excommunication and that a person cannot be considered as excommunicated unless there is evidence that there is a recognised dignitary who has the capacity to enforce excommunication and that he did excommunicate a particular person for valid reasons.⁽¹⁾

As regards preference between degraded and undegraded relations three views⁽²⁾ have been held. In Sivasangu v. Minal⁽³⁾ and Narasanna v. Gangu⁽⁴⁾ the rights of the undegraded relations had been totally denied. But in Hiralal v. Tripura Charan⁽⁵⁾ the Full Bench of the Calcutta High Court apparently distinguished the cases as pertaining to a competition between degraded and undegraded heirs and left the question open. In Subbaraya v. Ramasami⁽⁶⁾ Ayyar and Boddam J.J. uttered an obiter dictum to the effect that on equitable grounds preference may be given to the degraded relations. In Meenakshi v. Muniandi⁽⁷⁾ in which a legitimate son was preferred to an illegitimate daughter Oldfield J. criticised the obiter in Subbaraya's case and caustically observed: "I cannot understand how the Court would be following any equity, or good conscience in doing so or would be promoting any other result that the mitigation of disabilities, which at present in some degrees at least deter people from

(1) Neelawa v. Gurushidappa (1936) A.I.R. 1937 Bom. 169. See also Bhattacharya's Commentaries on H.L.p. 346: degradation is not necessarily equal to excommunication.

(2) Kothandaram v. Subbier supra.

(3) (1888) 12 Mad. 277 supra.

(4) (1899) 13 Mad. 133.

(5) (1913) 40 Cal. 650.

(6) (1899) 23 Mad. 171; see also Sarkar pp. 588-89 supra. p. 34 no. 8.

(7) (1914) 38 Mad. 1144

formation of illicit relations."⁽¹⁾ According to this view a remote legitimate heir should be preferred to a nearer illegitimate - and eventually a degraded - heir. The third view is that amongst both undegraded and degraded relations the nearer one, whether degraded or not, should exclude the remote one.⁽²⁾

There appears to be some confusion in the reasoning of their Lordships in Meenakshi's case. The question about competition between degraded and undegraded relatives is not necessarily the same as the question about competition between the legitimate and illegitimate relatives. As regards the latter competition a legitimate heir should always exclude an illegitimate heirs of the same class though not an illegitimate heir from a nearer class of heirs.⁽³⁾ But, as in the case of Narsanna v. Gangu,⁽⁴⁾ there can be a competition between a degraded and an undegraded relative both of whom are legitimate ones; similarly, as in Sivasangu v. Minal,⁽⁵⁾ there can be a competition between degraded and undegraded relatives both of whom are illegitimate. But without making such distinctions their Lordships in Meenakshi's case remained content with laying down a broad as well as an indistinct principle for all such cases.

Since degradation is not equal to civil death and does not sever the tie of relationship with the undegraded relations, the real

(1) Ibid at p.1147; see also at p.1152.

(2) Nammaiya v. Tiruvengadam (1913)24 M.L.J.223 (i.e. 18 I.C.601) referred to in Kothandaram v. Subbier (1927)52 M.L.J.514. In Nammaiya's case a legitimate daughter's daughter was preferred to an illegitimate daughter's son. But see the different version put upon the ratio of this case in Meenakshi v. Muniandi (1914)38 Mad.1144 and Sarkar p.590.

(3) See *supra* pp.429-30.

(4) (1889)13 Mad.133.

(5) (1888)12 Mad.277.

stand that should be adopted is that subject to the rule of preference based on legitimacy, questions of preference between degraded and undegraded relations should be solved purely on the basis of nearness of heirs according to the general law.

There have been two views as to whether the ordinary law or special customary law should be adopted in determining succession to the property of a prostitute or a dancing girl. On the one hand special attempt has been made in some of the cases to find out whether the parties were, amongst themselves, subject to some special custom of succession to strīdhana. In Sivasangu v. Minah ⁽¹⁾ their Lordships of the Madras High Court specially remitted the case to find out whether there was a custom amongst prostitutes to the effect that a degraded sister is preferred to an undegraded sister and secured an answer in the affirmative. In Muttukannu v. Paramasami ⁽²⁾ their Lordships took the view that the class of dancing women being recognised by Hindu law as a separate class having legal status as such, the usage of that class regulates, in the absence of positive legislation to the contrary, the rights of the parties with regard to inheritance, adoption, survivorship etc.

Thus there is a flow of cases on custom of adoption by prostitutes, According to the view approved in the Bombay High Court of adoption of a daughter by a naikin is invalid notwithstanding a custom to the contrary as the custom itself is to be regarded as

(1) (1888)12 Mad.277.

(2) (1889)12 Mad.214. See also Meenakshi v. Muniandi (1914)38 Mad. 1144 at 1151; Subbaratna v. Balakrishnaswami A.I.R.1918 Mad.642.

immoral.⁽¹⁾ In Madras such custom is recognised to have existed amongst the devadasis (dancing girls) and the adoption has been held to be valid in the absence of proof that such adoption was made with the purpose of utilising the girl for prostitution.⁽²⁾ According to this latter view such adoption has no reference to spiritual benefit but arises out of one's own desire to have a daughter to look after oneself in old age and so no formal ceremony of adoption is necessary.⁽³⁾ When a dancing girl has been adopted by another dancing girl the former becomes entitled to inherit from the latter and vice versa; but in the absence of proof of a custom to that effect she does not acquire rights of collateral succession in the family of the adoptress.⁽⁴⁾

Asserting a bold but an incorrect proposition⁽⁵⁾ that in every previous case about dancing girls the general accepted principle was that not Hindu law but customary law and usage govern such disputes, their Lordships of the Madras High Court held that according to a custom amongst the dasis of Palamcottah an unmarried sister is

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- (1) Mathura v. Esu (1880)4 Bom.845; Tara Naikin v. Nana (1890)14 Bom.90; Hira v. Radha (1913)37 Bom.116; But see Manjamma v. Sheshagirirao (1902)26 Bom.491 at 495: an adoption by a prostitute as distinguished from a naikin may be valid. See also Narendra v. Dina (1909)36 Cal.824: a prostitute cannot validly adopt a son to herself and such son has no right of inheritance to her property.
- (2) Chalakonda v. Chalakonda (1864)2 M.H.C.R.56; Kamalam v. Sadagopa (1878)1 Mad.356; Venku v. Mahalinga (1888)11 Mad.393; Muttukannu v. Paramasami (1889)12 Mad.214; Kamalakshi v. Ramaswami (1896)19 Mad.127; Sarojini v. Jalajakshi (1898)21 Mad.229; Veeranna v. Sarasiratnam A.I.R.1936 Mad.639; Gangamma v. Kuppammal A.I.R.1937 Mad.139.
- (3) Gangamma v. Kuppammal A.I.R.1937 Mad.139.
- (4) Venkata Chellamma v. Cheekati A.I.R.1953 Mad.57
- (5) For the contrary view taken in some of the cases previous to this one see infra.

preferred to a married sister in succession to property left by a dasi.⁽¹⁾ In Bera Chandramma v. Naganna⁽²⁾ it had been held that according to a custom amongst dancing girls' sons and daughters succeed equally and simultaneously. But in Brahadeeswara v. Rajagopal their Lordships of the same High Court refused to extend the custom beyond Vizgapatam district⁽³⁾ and endorsed the general rule accepted in the Madras High Court about succession to dancing girls, namely, amongst their progeny females are preferred to males.⁽⁴⁾

As against this the other view adopted in an overwhelming majority of decisions is that only ordinary Hindu law - subject, of course, to the proof of a special custom - is applicable to succession to property of prostitutes. Rejecting an argument of Golapchandra Sarkar that as prostitutes form a separate fifth class by themselves⁽⁵⁾ the custom of a sister succeeding to another prostitute sister which was recognised in Sivasangu's case should be recognised all over India their Lordships of the Calcutta High Court held in Sarna Moyee v. Secretary⁽⁶⁾ of State of India that a prostitute, even if she

(1) Shanmugathammal v. Gomathi A.I.R.1935 Mad.58

Although the actual custom proved in this case was that an unmarried sister is preferred to a married sister the Court unjustifiably extended the same to preferring an unmarried niece to a married sister. See the report for an unconvincing attempt to justify such extension.

(2) (1923)45 M.L.J.228.

(3) (1946)II M.L.J.173. One of the main reasons for putting such territorial restriction was that the decision in Bera Chandramma's case was based upon a statement in Thurston's Caste and Tribes of Southern India which the author had taken from a census report published fifty years before.

(4) Kamakshi v. Nagaratnam 5 M.H.C.R.161 at 164-65; Subbaratnam v. Balakrishnaswami (1918)Mad.642, Balasundaram v. Kamakshi I.L.R. 1937 Mad.278; Gangamma v. Kupppammal A.I.R.1937 Mad.139.

(5) See supra p.

(6) (1897)25 Cal.254.

becomes an outcaste, does not cease to be a Hindu and that ordinary Hindu law would be applicable to succession to her property. The ratio of this decision was followed in many other cases by their Lordships of the Allahabad, Madras and Calcutta High Courts.⁽¹⁾ In Ram Pergash v. Mt. Dahan Bibi,⁽²⁾ Jawala Prasad J. who stands probably as the best amongst the protagonists of this view explained in detail why Hindu law must apply to all those people who have not adopted the personal law relating to another religion. Admitting that the class of prostitutes was recognised by the Śāstra as a different class his Lordship stressed the fact that the provisions in the śāstra are as applicable to the persons who have fallen off from the religion and have become outcaste as to persons who strictly follow the religion.⁽³⁾

But considering that the position of a prostitute's family is very similar to that of a Hindu male coparcenary⁽⁴⁾ it is reasonable to give, at least amongst the issue of the proposita, a preference to females over males. Similarly after the helpful remark of Kautilya⁽⁵⁾ it is also necessary to stress that in any case the sister of a prostitute ought to be considered as her heir.

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- (1) Subbaraya v. Ramasami (1899)23 Mad.171 at 177; Narain v. Tirlok (1906)29 All.4 at 7; Tripura v. Harimati (1911)38 Cal.493; Hiralal v. Tripura Charan (1913)40 Cal.650; Ram Pergash v. Mt. Dahan Bibi Pat.H.C. cases (1924)85 at 96; Shaikh Taleb Ali v. Shaikh Abdul Razack A.I.R.1925 Cal.748; Narayan v. Laxman (1927) 51 Bom.784 at 788; Charu Bala Dasi v. Province of West Bengal A.I.R.1950 Cal.473.
- (2) Pat.H.C. cases (1924)85.
- (3) Ibid at p.95. The vast number of texts about prostitutes which were quoted and discussed in the judgement were probably suggested to the Court by the eminent scholar Dr.K.P.Jayaswal who appeared on behalf of the plaintiff - appellant in this case.
- (4) Supra pp.520-1 and infra pp.566-69.
- (5) Supra pp.520.

However, such preference in favour of female children will not always be possible if the position, namely, only ordinary Hindu law is applicable, is accepted in toto. For instance in Shaikh Taleb Ali v. Shaikh Abdul Razack,⁽¹⁾ which was a case of the Bengal School, it was held, following the law of the Dāyabhāga,⁽²⁾ that the son of a prostitute is to be preferred to her married daughter. Similarly though the right of a prostitute's sister was recognised under a custom in Madras⁽³⁾ and, on the basis of heritable sapinda^{as}ship, in Bombay,⁽⁴⁾ their Lordships of the Calcutta High Court simply refused to recognise her right and declared the property[^] escheated to the Crown in the absence of any other heir.⁽⁵⁾ The decisions in these latter cases have evidently over-looked the fundamental structure of

(1) A.I.R.1925 Cal.748.

(2) Supra pp.377-79.

(3) Sivasangu v. Minal (1888)12 Mad.277; Shanmugathammal v. Gomathi A.I.R.1935 Mad.58.

(4) Narayan v. Laxman (1927)51 Bom.784. Notwithstanding the arguments of Dr.P.V.Kane, their Lordships admitted the right of a sister to succeed to her prostitute sister's property as a heritable bandhu of the latter. For a discussion about heritable sapinda^{as}ship through common mother see supra pp.425

(5) Sarna Moyee v. Secretary of State for India (1897)25 Cal.254; Charu Bala v. Province of West Bengal A.I.R.1950 Cal.473. Notwithstanding the argument of Golapchandra Sarkar the decision in Sivasangu's case was distinguished in Sarna Moyee's case as being based upon local usage and upon the fact that the sisters stayed jointly. But even granting that only ordinary Hindu law is applicable and that Jīmūta and his followers do not give heirs after the sapinda^{as} and samānodakas of the husband, their Lordships ought to have followed Jagannātha who says that the sapinda^{as} of the father and then of the mother should succeed in default of the husband's sapinda^{as} etc. - see supra pp.495. His opinion has been accepted by almost all the leading text-book writers - see Banerjee p.500; Mayne 10th edi.p.761; Mulla 9th edi.pp.149-51; W.& B.4th edi.pp.507-8; Trevelyan 2nd edi. 461; Sarkar 8th edi.646 - all referred to in A.I.R.1950 Cal. 473 at 475-76. But their Lordships rejected the unanimous opinion of all these scholars and blindly followed the decision in Sarna Moyee's case.

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a prostitute's family as well as some of the provisions of the ordinary Hindu law of the Bengal School. It may be stated that the view of the Bombay High Court that a sister should be allowed to succeed before the Crown at least as a blood-relation and heritable bandhu ought to be upheld.

This discussion invariably leads us to another question, namely, whether a prostitute's family resembles a Hindu coparcenary. From the provisions of the Arthasāstra it seems that there is a striking resemblance between the two except for the fact that females alone would become members of a prostitute's coparcenary.⁽¹⁾ It is very difficult to determine whether the members of a prostitute's coparcenary have the two important rights invariably connected with an ordinary Hindu coparcenary, namely, right by birth, and right by survivorship.

The law on this point has developed entirely in the South. The older view of the Madras High Court was towards admitting that a prostitute's family does form a coparcenary. In c. Alasani v. c. Ratnachalam⁽²⁾ wherein a senior member of a devadasi family claimed that she was entitled to joint family property her right was conceded on that basis but without considering the question of right by birth or survivorship. In Kamakshi v. Nagaratnam⁽³⁾ the facts were as follows:- Two sisters Sitalakshimi and Kamakshi had jointly inherited the property of their grandmother and continued to stay joint.

(1) See supra pp. 520-1.

(2) (1864) 2 M.H.C.R. 56. Here at p. 76 Holloway, J. calls the mother and daughter "an undivided family".

(3) (1870) 5 M.H.C.R. 161.

On the death of the former her daughter, the plaintiff, claimed the moiety of the property on the ground that she herself was a 'coparcener with her mother's sister'. Following Segamalathammal's case⁽¹⁾ their Lordships held that the property, being inherited one, was not strīdhana in the hands of the two sisters. Naturally one would have had expected their Lordships to follow by analogy the other incorrect rule laid down in Sengamalathammal's case, namely, two daughters succeeding to the property of their mother take jointly with rights of survivorship.⁽²⁾ Or even otherwise succession to Sitalakshimi's share would have devolved upon Kamakshi as the next nearest heir to her grandmother.⁽³⁾ But remaining oblivious of the position which they themselves had taken, namely, that the property was not strīdhana of Sitalakshimi, and also of the position taken by their Lordships in Sengamalathammal's case, Scott C.J. and Collett J. firmly declared that "... the general rule must, we think, be considered to be that children of dancing women take by descent the estate of coparceners in their mother's property; their daughters as a class first and on failure of daughters their sons as a class..."⁽⁴⁾ and gave a decision in favour of the plaintiff daughter. But as Sitalakshimi took only a limited estate according to their Lordships themselves her share had ceased on her death to be the plaintiff's 'mother's property' and had reverted to the heirs of the original

(1) (1867)3 M.H.C.R.312.

(2) See supra p.422.

(3) As succession in such case is traced to the original proposita - see supra ... From this point of view the plaintiff had no locus standi at all as daughter's daughter's daughter is not at all an heir in succession to her maternal great-grandmother's strīdhana - see supra ...

(4) 5 M.H.C.R.161 at 165. It must be stated here that the interest which coparceners take in their property is by birth and by survivorship but not by 'descent'.

proposita i.e. the plaintiff's great-grandmother. So it is impossible to understand the ratio of this decision unless it is assumed that their Lordships recognised the daughter's right both by birth as well as by survivorship.

Preferring an undegraded sister to a degraded brother their Lordships of the Madras High Court remarked in Sivasangu v. Minal⁽¹⁾ "... we observe that there is an analogy between the legal relation of two prostitute sisters living together in their degraded condition and that of two brothers living in coparcenary; ...". In Muttukannu v. Paramasami⁽²⁾ it was observed that amongst dancing girls the special usage of the class governed, in the absense of positive legislation to the contrary the rights of inheritance, adoption and survivorship. Thus it can be seen that according to the old notion of the Madras High Court a Hindu male coparcenary and a prostitute's family were looked upon as identical so far as the basic rights of the members of the latter are concerned.

But in Kolikambal v. Sundarammal⁽³⁾ wherein the mother and the daughter from a dancing girl family had joined to defeat the interest of the alienee by maintaining that the alienated property was joint family property the learned judge Kumarasami Sastri J. observed that the previous cases recognised coparcenary with right

(1) (1889)12 Mad.277 at 284-85.

(2) (1889)12 Mad.214. Referring to the decision in Kamakshi's case their Lordships observed: "Though the right of survivorship recognised in that case was one known (unknown?) to ordinary Hindu law yet the usage of the caste was upheld so far as it related to the adoption of daughters and gave them the status of male coparceners in an ordinary Hindu family." Bracketed word is inserted by the editor of the reprinted volume.

(3) A.I.R.1925 Mad.902.

of survivorship but not with right by birth; however, he gave the actual decision in favour of the mother and daughter on the factual basis that their property was coparcenary property as it consisted of the joint earnings of the mother and daughter which were pooled together for joint living. In Gangamma v. Kuppammal⁽¹⁾ wherein the question of right by birth came as a direct issue before a single judge, Wadsworth J. remarked that in the previous case Sastri J. used the word 'coparcenary' 'in a somewhat unprecise manner' and held that whether according to the law or any custom recognised by a Court of law coparcenary with its essence of right by birth does not exist amongst the dancing girls. The decision had lamentable effects on the families of dancing girls since it failed to have regard for the sociological structure of a dancing girl's family and disturbed the tenor of the previous decisions.

There is no certainty whether a prostitute heir takes a limited or an absolute interest in the property which she inherits from another prostitute. In Kamakshi's case⁽²⁾ the general law was relied upon for the conclusion that even a dancing girl gets only a limited interest in the property which she inherits from another dancing girl. But the later view of the Madras High Court is that they take absolute estate in inherited strīdhana.⁽³⁾ Taking into consideration the fact that the dancing girls - and in fact all prostitutes - form a separate 'emancipated community' and 'live and acquire property quite

(1) A.I.R.1937 Mad.139.

(2) (1870)5 M.H.C.R.161.

(3) Subbaratna v. Balakrishnaswami (1918)A.I.R.Mad.642.

independently of their male relatives' ⁽¹⁾ there can be no doubt that the latter view is definitely more reasonable and equitable. But sitting as a single judge Wadsworth J. gave another questionable decision in Balasundaram v. Kamakshi ⁽²⁾ wherein the dispute concerned the property of a dancing girl who, leaving her traditional calling, had become a married woman but reverted to her original calling after widowhood and acquired property during such immoral life. The question was whether her daughter took a limited or an absolute estate in the property which she inherited from her mother. Doubting whether the subsequent laxity of a married dancing girl 'would give her any other character than that of an unchaste woman' Wadsworth J. observed that the property 'has devolved upon her daughters clothed with the character of the property acquired by an ordinary Hindu female' and that 'they would hold it subject to the same disabilities as attended the ownership of property by a female when it was in the hands of their mother'. The learned judge seems to have forgotten the basic general principle of Hindu law, namely, that the quantum of interest taken by a particular heir depends not upon the kind of the property or the status of the proposita but upon the status of the heir alone. For instance, a son inheriting his father's property or his mother's strīdhana takes a full interest whereas a daughter takes limited interest. Similarly a widow takes a limited interest in her husband's property but the husband gets an absolute interest in the strīdhana which he inherits from his wife. As an ordinary dancing girl takes

(1) A.I.R.1936 Mad.958.

(2) Ibid.

absolute property in her prostitute mother's strīdhana - and to this the learned judge has taken no objection - the daughter in this case, who presumably appears to have continued living only as a dancing girl, ought to have been held as an absolute owner of the inherited property. The learned judge has also neglected to consider the fact that the property in dispute was acquired by the proposita from the paramour and not from the husband and that too after she reverted to the profession by becoming a concubine. It was also necessary to consider and compare the duration of her married life and professional life both before and after the marriage. If it is assumed that she remained as a married woman for five years and led an immoral life for forty years then it was ridiculous to hold that she died only as 'an unchaste married woman'. It is only to be hoped that the ratio of this decision would not be followed by their Lordships of the Madras or other High Courts.

Touching the question of succession to a prostitute's property their Lordships of the Supreme Court have given an important decision recently in Saraswanthi v. Jagadambal⁽¹⁾ which has made the already slippery position of the law more unstable. The facts of this case were as follows:- One Thangathammal who was a devadasi died leaving three daughters two of whom were married and one of whom was herself a dasi. This dasi who was an unmarried girl claimed that on the bases of degradation as well as custom she excluded her two married sisters in succession to their mother's property. Their Lordships of the Madras High Court had decided that all the daughters

(1) A.I.R.1953 S.C.201.

were entitled to inherit equally. Confirming this decision in the Supreme Court Mahajan J. observed:

(1) "Degradation of a woman does not and cannot sever the ties of blood and succession is more often than not determined by ties of blood than by moral character of the heir."

(11) "In the absence of proof of existence of a custom governing succession the decision of the case has to rest on the rules of justice, equity and good conscience because admittedly no clear text of Hindu law applied to such a case. The High Court thought that the just rule to apply was one of propinquity to the case, according to which the married and the dasi daughter would take the mother's property in equal shares. No exception can be taken to this finding given by the High Court."⁽¹⁾

As regards degradation the decision is, of course, a correct one.⁽²⁾ Moreover in the case of a hereditary prostitute the question about degradation does not arise at all⁽³⁾ since she forms a member of a class by itself.⁽⁴⁾ At the most her married daughters could have been considered as 'elevated' from their original class.⁽⁵⁾

But the other ratio resorted to in this case is highly confusing. Hitherto the decisions concerning succession to property of dancing girls were based either on custom⁽⁶⁾ or on ordinary Hindu law.⁽⁷⁾ The conflict in this case ought to have been resolved

(1) A.I.R.1953 S.C.201 at 204.

(2) See supra pp.547-48.

(3) Narayan v. Laxman (1927)51 Bom.784 at 787.

(4) Supra pp.518.

(5) Such was the case in Sivasangu v. Minal (1888)12 Mad.277. For degradation and elevation from caste see supra pp.

(6) Supra .

(7) Supra .

either by taking recourse to ordinary Hindu law, by taking evidence to see whether there is any custom in this respect, or by resorting to the Mitākṣarā line of succession which is nearest to the matrilineal succession logically expected in the case of a prostitute's property.⁽¹⁾ But by resorting to principles both of propinquity as well as of justice, equity and good conscience in determining the law of succession to prostitute's property their Lordships of the Supreme Court have made vague what was already indistinct.

In the first place, a simple rule of propinquity should not be resorted to as it would bring both male and female heirs on equal footing; and this is more undesirable in succession to a prostitute's property. In the second place, the results of the application of both these principles may not coincide with each other: propinquity and equity may select two different heirs at the same time. For instance, a prostitute's son staying separate from her would be preferable, from the point of view of propinquity, to her daughter's daughter who is a prostitute and stays jointly with her grandmother; but from an equitable point of view the position would be just the reverse. The same thing has happened in this case also. The unmarried daughter was sharing the social position of her mother and had nothing to depend upon for her livelihood except the very profession which her mother followed. On the other hand, the married sisters could easily afford to depend on their husbands. So just as in the case of an ordinary female, so in the case of a prostitute, an unmarried daughter ought to be preferred to a married daughter.

(1) Supra pp.521-22. Of course, this would have been the same as ordinary law in this case which came from Madras.

Their Lordships of the Supreme Court could have made the law simple and systematic by laying down that the Mitākṣarā line of succession is applicable to property of all prostitutes wherever they come from; instead of that they preferred to cling to two incongruent principles, leaving the law in a somewhat speculative position.

It has been laid down in many cases that in the absence of heirs the property devolves upon the Crown by escheat.⁽¹⁾ The opinion of Mr. Justice Strange to the effect that the property of a dancing girl in such case should devolve upon the other members of the pagoda (i.e. the temple to which the dasi was dedicated) has to be discarded; for Vijñāneśvara would have certainly laid down such a provision in the manner in which he lays down similar rules for the property of a celibate student, an ascetic or a foreign merchant.⁽²⁾

However, a certain misunderstanding on the point of escheat deserves to be cleared here. In Hiralal v. Tripura Charan⁽³⁾ Their Lordships of the Full Bench of the Calcutta High Court derived an imaginary support from a passage in the Arthaśāstra and laid down an obiter dictum that according to this passage even the Crown taking by escheat the property of a prostitute was enjoined to give away the property in charity.⁽⁴⁾ Depending upon this passage referred to by their Lordships Banerjee advances in the following words his argument that degradation brings about complete severance from the

(1) Sarna Moyee v. Secretary of State for India (1897)25 Cal.254; Bhutnath v. Secretary of State for India (1906)10 C.W.N.1086; Charu Bala Dasi v. Province of West Bengal A.I.R.1950 Ca.473.

(2) See supra p. 521.

(3) (1913)40 Cal.650.

(4) Ibid at p.671-2.

undegraded relations: "If the king himself is enjoined to use such property in this particular way, is it reasonable to hold that undegraded relations of a deceased fallen woman should inherit and enjoy these wages of sin as ordinary property?"⁽¹⁾ It is evident that neither their Lordships nor the learned scholar have cared to look into the original passage to which they refer.⁽²⁾ It has no connection whatsoever with succession to prostitutes' property. It refers to succession to a male's property and Kauṭilya merely lays down therein that the property of an heirless male should be taken by the king after having provided for the maintenance of the 'women' of the propositus but that the property of a śrotriya brahmin should be given away to other śrotriya brahmins. The latter provision is quite in consonance with many other provisions which are specially favourable to Brahmins. //

Before turning to other customary laws it must be stated that the recent trend of the Indian law is towards limiting or, as far as possible, stopping prostitution in India. In Bombay Province, which was always ahead of others in such social reforms, an enactment was passed in the year 1934 which declared illegal any dedication of a woman as devadasi.⁽³⁾ The example was soon followed in the Madras

(1) Banerjee p.466.

(2) They refer to Mysore edi.p.161 which reads: "Adāyādakaṃ rājā haret strīvr̥ttipretakadaryavarjāmanyatra śrotriyadravyāt. Tat traividyebhyaḥ prayachchhet/^ñ See also Gaṇapati Śāstri's edi.vol.2 p.34 - Kau.3.60.

(3) The Bombay Devadasis Protection Act X of 1934 s.3.

province⁽¹⁾ where even dancing in a temple at any festival held in respect of a diety was made unlawful.⁽²⁾

Under the Bombay Prevention of Prostitution Act XI of 1923 soliciting, living on the earnings of prostitution, importing a woman or a girl for prostitution, procuring a woman or girl for prostitution, unlawful detention of a woman or girl for the purpose of prostitution etc. have been made punishable offences.⁽³⁾ The Indian Parliament has recently incorporated almost all the provisions from the Bombay enactment into The Suppression of Immoral Traffic in Women and Girls Act 104 of 1956.⁽⁴⁾ Although the new Act does not make prostitution itself an offence it will destroy within a few years the whole class of prostitutes or,-and this is more likely - may drive the whole profession underground.⁽⁵⁾

Amongst the different systems of customary laws in India the most prominent is the Marumakkattayam law which, being based upon matriarchial society and matrilineal succession, is directly opposed not only to the general Hindu law but also to most of the other leading legal systems of the world. It has now been established that kinship through females has existed in different ages and still exists in the world in widely distributed areas like North America, Haili, Mexico, Peru, Guiana, Central and South Africa, Madagascar,

(1) The Madras Devadasis (Prevention of Dedication) Act XXXI of 1947.

(2) Ibid s.3(3).

(3) See ss.3,5,6,7 and 8. The Act has been amended by the Bombay enactments: IX of 1926; IX of 1927; XII of 1930; XX of 1951; VII of 1943; XVII of 1945 and XXVI of 1948.

(4) See ss.3-9.

(5) For the probable social effects of this Act see the conclusion.

Borneo, Southern and Northern India, Ceylon etc. Usually regarded as a mark of a primitive state of society, matriarchial systems have aroused great curiosity and deeper interest amongst students of early civilization and the evolution of social institutions.⁽¹⁾ This matriarchial system still prevails as a living institution in the south-west part of India. Leaving aside the many interesting details of this system the reader of the present work will have to rivet his attention, as far as possible, only on that part of the system which deals with inheritance and succession that affect the proprietary status of women.

The Matriarchial system prevails in Malabar, Travancore, Cochin and the district of South Canara. In South Canara it is known as the Aliyasantana law whereas elsewhere it is known as Marumakkattayam law. A family subject to the Aliyasantana law is called Kutumba whereas one subject to the Marumakkattayam law is called tarwad.⁽²⁾ Before turning to the salient features of the Marumakkattayam law it must be stated that before the introduction of the British regime there was no uniformity in this customary law: the different Rajas and the native chieftains had different and irregular systems of administering justice; there were no records of decisions which, in some cases, were based upon ordeals and, in some, upon the opinion of brahmins assisted by laymen acting as their assessors. With such complex nature of the different local systems of judicial administrations one could have hardly thought of tracing unswerving

(1) Krishna Pandalai: Marumakkattayam Law (a thesis submitted to the University of London for LL.D.(1914) p.1.

(2) Marumakkattayam Law p.3.

adherence to some inflexible principles. It was only the judge-made law of the British Courts followed by the Native State Courts (which were formulated on similar basis) that put an end to the complex as well as to the growing state of the law and, at the same time, harmonised and petrified the same.⁽¹⁾

Although many earlier though stray references to this system of law can be traced,⁽²⁾ Wigram who in 1885 wrote his book 'Malabar Law and Custom' was almost the first person to state a complete and well-connected account of the development of the judicial acceptance of this customary law. The salient features of the Marumakkattayam system in those days were non-existence of the institution of marriage, impartibility of the joint property of Tarwads⁽³⁾ and matrilineal succession. About the quasi-marriage customs Wigram wrote: "All European writers, Lubbock, Mayr, McLennan and others agree in the conclusion that the system of inheritance in the female line prevalent among the Nayars could only have originated from a type of polyandry resembling free love. The ancient rule was that

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- (1) Marumakkattayam law p.182 - relying upon the report of Joint Commission from Bengal and Bombay 1792 & 1793 paragraphs 387-400; Wigram 2nd ed. p.132: "In this, as in many other cases, the probability is that there was no uniform custom till hard and fast rules were introduced by the Courts."
 - (2) For a good bibliography see E.K.Gough: Changing kinship usages in the setting of political and economic change among the Nayars of Malabar, Journal of the Royal Anthropological Institute (1952) Vol.82 pp.71-87.
 - (3) Tarwad in Marumakkattayam law means a joint family consisting of a common ancestress with her children and all the descendants in the female line and having a community of property. Tavazhi means only a sub-group of a tarwad formed on a similar basis but having at its head a common ancestress who is lower in degree than the common ancestress of the tarwad. The same meaning is given to the words Kutumba and kavaru respectively in the Aliyasantana law - compare s.3(i & j) of the Madras Marumakkattayam Act, 1932 with s.3(b & c) of the Madras Aliyasantama Act, 1949.

the woman should remain in her own house and be visited by her husband, and that the eldest female in the house should be the head of the house. Time has brought modification in the system, and in Malabar, though not in Canara, the eldest female has given way to the eldest male. The wife sometimes has a separate house provided for her, where she lives with her husband. ... But polyandry may now be said to be dead, and although the issue of a Nayar marriage are still children of their mother rather than of their father, marriage may be defined as a contract based on mutual consent and dissoluble at will. I am quite ready to admit that, but for the brahmans, all traces of polyandry would long since have disappeared, and that the brahmans encouraged concubinage between the younger members of their families and the Nayar woman for the purpose of maintaining the impartibility of their estates."⁽¹⁾ The generally received opinion in

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- (1) Wigram 2nd.edi.pp.32-33. Montaigne in his "Essay upon Some Verses of Virgil" says that polyandry was introduced by the Nayars because like Catewayo they looked upon 'army of bachelors' as the most effective instrument in war. It is interesting to note that this essay was published in 1588 i.e. even before the Keralamāhātmya and the Keralotpatti which were written not earlier than two centuries ago by the Nambudri Brahmins - Wigram 2nd edi.pp.33-34. Moreover apart from the intention of retaining the impartibility of the estates, Brahmins in the Malabar who are supposed to have gone there sometime during 200-500A.D. and to have remained unaffected by the development of the Hindu law outside Malabar might have had another reason to start polyandry. Constituting only a fraction of the society in Malabar the males amongst the brahmins had, probably through scarcity of females of their caste in those days, to establish some kind of relationship with the females of the śūdra class which constituted the bulk of the population of the Malabar. But although a brahmin is technically allowed to have a śūdra wife both Manu and Yajñavalkya carry on a tirade against marriage between a brahmin male and a śūdra female. The brahmins who went into Kerala probably cut a midway through the precepts of the śāstra and the expediency arising out of the circumstances: they decided to cohabit with the śūdra concubines but left the issue

the last century was that till the passing of the Act IV of 1896 which was entitled "An Act to provide a form of marriage for persons following the Marumakkathayam or Aliy Sanatana Law" it was almost impossible for a marumakkattayam person to contract marriage in its ordinary popular significance.⁽¹⁾ Every girl in a Nayar Tarwad, while still a child, goes through a ceremony called Tāli-Kaṭṭa-Kalyāṇam but this ceremony, although something similar in name to marriage, is ^{in fact} ~~nothing~~ but a caste rite the historical origin and the exact significance of which is shrouded in mystery.⁽²⁾ A girl in a Marumakkattayam tarwad is, after she has attained maturity, united to a man of her own caste or a brahmin. The quasi-matrimonial connection which subsists between the two is called 'sambandham', literally an (innominate) relationship, and during the last century and in the beginning of this century there were two views as to whether this sambandham is in any way equal to a valid marriage and creates the consequential rights and liabilities.⁽³⁾ But since originally at least the wife used to stay in her own house and the husband in his own it is evident that the sambandham between them

of such relationship in the families of the mothers themselves. This clever idea brought about two desirable effects for them, namely, that regular visits to a particular woman established a continuity in sexual relationship which is so essential for social stability; at the same time, keeping both the śūdra female and her children in her own house prevented the breach of the śāstric rules and kept the brahminical culture unadulterated.

(1) Wigram 2nd edi.p.34.

(2) Wigram p.34. For the ceremony see Memorandum A p.5 attached to the Malabar Commission quoted in Wigram pp.34-36.

(3) Wigram p.38. For the different views about Sambandham see Wigram pp.40-51.

appears to be incongruent with the idea of the marriage which prevails in the patriarchal and eventually the larger part of the world.

As regards the propriety ideas of the Marumakkattayis the most notable thing is that the property of a tarwad is impartible; community of interest can be severed only by voluntary consent of all the members.⁽¹⁾ The senior male member in a Marumakkattayi family is called Karnavan and as such he is the natural guardian of every member in the family. He alone can sue and be sued as the representative of the family. The Karnavan for the time being has absolute control over the family income and expenditure. The rights of the junior members are the rights of males to succeed to Karnavanship by seniority and the right of males and females to be supported and maintained in the house of the family.⁽²⁾ Tarwad property being (apart from Statute) impartible there is no question about the devolution of the interest of an undivided member of a tarwad.

The self-acquisitions of an individual member of a Marumakkattayi family are at his absolute disposal during his life-time and the last survivor of a tarwad has the same power over the family property as if it were his self-acquisitions.⁽³⁾ Females have the same rights in this respect as males.⁽⁴⁾ Under the Madras Act V of

(1) Wigram p.3.

(2) Wigram p.52-53 - For detailed information about karnavan's rights and obligations in the last century see Wigram chapters III-V. But in *śūdra* families the seniormost woman, by custom, becomes the manageress - Wigram p.52. See also Dr. Buchanan's 'A Journey from Madras through Mysore, Cannanore and Malabar' Vol.II.pp.95-96 quoted in Wigram pp.132-33: "... A man's mother manages his family; and after his death his eldest sister assumes the direction..."

(3) Wigram p.127.

(4) T.L.Strange: Manual of Hindu Law 2nd edi.p.399.

1858⁽¹⁾ every person governed by the Marumakkattay^{yam} law of inheritance could, by will, dispose of property which he could legally alienate by gift inter vivos, but self-acquired property not disposed of in the above-mentioned manner by a deceased Marumakkattayi devolves upon his or her family with this distinction that a man's property devolved upon his tarwad whereas a woman's property devolved upon her children.⁽²⁾

From 1916 onwards there started a downpour of several enactments on Marumakkattayam law which was continuously growing and gaining shape since Mr. Wigram wrote his book at a time at which it apparently appeared to be exhaustive. It would be interesting to know the exact stage it had arrived at just before the law was being moulded by legislation. Krishnan Pandalai who in 1914 attempted to ascertain the rules of partition and succession under Marumakkattayam

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- (1) The history of the power of testamentary disposition in the former Travancore State is different. At first the right extended to a half only of the separate and self-acquired property, and later it was enlarged to cover the whole.
- (2) Wigram p.129 & 131. Although the word used in Wigram p.129 is 'family' of a man what he really means thereby is man's tarwad and not his tavazhi - compare the above page from Wigram with Marumakkattayam law p.18. Mr.T.S.Strange who is the earliest amongst the authors who have written something on Marumakkattayam law (Marumakkattayam Law p.19) writes "self-acquired moveable property belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it as well as males. On demise it descends, in the case of males, to their sister's sons, or nearest Anandravans, and, in the case of females, to their issue male and female." - T.L.Strange: Manual of Hindu Law 2nd edi.s.399. Buchanan says that on the death of a male his moveable property is taken by his sister's sons and daughters whereas his landed estate is managed by the eldest male of the family - A Journey from Madras through Mysore, Cannanore and Malabar - by Dr.Buchanan Vol.II.pp.95-96 quoted in Wigram p.133. The judicial development of the law was, however, in favour of treating a man's tarwad and not only his tavazhi as his heirs. This was obviously against the original custom and public opinion. - Marumakkattayam Law pp.18-37, esp.pp.18, 19,24,27 etc.

law stated his conclusions as follows:-

(1) Separate Property: In the case of a deceased male the heirs to his separate property were his mother and her descendants i.e. his mother's tavazhi; in the case of a female her heirs were her own children and the descendants in the female line of her daughters. Thus Marumakkattayam system was founded on and followed propinquity of relation traced through females.⁽¹⁾

(2) Joint property of a Tarwad: The uniformly accepted rule was that tarwad property was impartible unless the members of a tarwad agreed to divide the property.⁽²⁾ Though there was no direct decision to that effect it was felt that an individual member should not have the right capriciously or maliciously to veto the wishes of the other members to effect the partition of the tarwad property.⁽³⁾ However, once partition was effected all the members in the undivided tarwad were entitled to a share, but partition of a tarwad property was done by making independent the different tavazhis of that tarwad so as to constitute new tarwads and by giving them full ownership in their respective shares in the original tarwad.⁽⁴⁾

Since the second decade of this century,⁽⁵⁾ however, the customary law of the different matriarchial communities in Malabar has been covered by legislation as a result of which their original shape has undergone several, and some of them radical, changes.

The enactments have been passed in different states and

(1) Marumakkattayam Law p.43.

(2) Ibid. p.101.

(3) Ibid. pp.120-21.

(4) Ibid. p.130.

(5) The legislation appears to have begun with the Travancore Nayar Regulation I of 1088 (1913 A.D.).

pertain to different communities in the Malabar; it is not surprising, therefore, that as a result of the permutation of both these factors we have fourteen enactments all of which contain provisions concerning partition and inheritance.⁽¹⁾

All these enactments have brought out some common and conspicuous changes in the Malabar law which they purport to amend and codify.⁽²⁾ The salient changes may be noted as follows:-

(A) Property of tarwad or Kutumba has been declared to be partible and the right of every member of a tarwad or a Kutumba to have a per capita share in the partition is recognised although the pre-requisite conditions for such partition vary from enactment to enactment.⁽³⁾

(B) In succession to the Separate property of a male his widow, children and father have been accepted as his heirs and the first two have been recognised as heirs in the first instance.⁽⁴⁾

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- (1) For different castes governed by patrilineal, matrilineal or mixed system of inheritance see M.S.A.Rao: Social Change in Malabar (1957)p.23. For an account as to how caste society in Malabar is fast changing into a class society see E.J.Miller: Caste and Territory in Malabar, American Anthropologist 1954 Vol.56 pp.410-20. The Nambudri brahmins form, however, a unique caste in Malabar. They went into Malabar from outside some time between the 2nd and the 5th century A.D. and carried along with them Hindu law as it existed then. Patriarchial family of the Roman type, deep-rooted bigotry, impartibility of the family property and dowry system (varasulka) are some of the distinctive features of this community. See Paramaswaren v. Nanjeli (1894)10 T.L.R.151 at 157; Vishnu v. Krishnan (1909) 25 T.L.R.196 at 200-204, 215-17 and 218-19.
- (2) See also Social Changes in Malabar pp.132-42. The change towards Hindu law had already started in the last century - see Mayne's preface to his first edition of Hindu Law.
- (3) Travancore Nayar Regulation ss.33-38; Travancore Nanjinad Vellala Regulation ss.30-31; Travancore Ezhava Regulation ss.30-31; Travancore Kshatriya Regulation ss.43-44; Travancore Krishnavaka Regulation ss.33-36; Madras Aliysantana Act ss.35-36 etc.
- (4) Travancore Nayers ss.11-15; Tra.Nan.Vellalas ss.16 & 24; Tra. Mal.Brahmins ss.15-16; Tra.Kshatriya ss.15-19; Cochin Thiyyas

(C) In succession to the separate property of a female her husband has been accepted as an heir though his position and the quantum of the share which he takes differs from enactment to enactment. (1)

Apart from these common features which give a fraternal resemblance to these enactments the other provisions of the same are so diverse as to create an impression of a jig-saw puzzle on the mind of a reader who tries to trace some uniformity in the codified law of Malabar. His work, however, has been considerably simplified by Dr. Derrett who has rightly divided these enactments into two sets, one of them comprising the enactments which are nearer in spirit to the general Hindu law and the other comprising the enactments which contain as it were the core of the real matrilineal law. (2) The division may be noted here as it would be of immense use in under-

ss.21-29; Mad.Marumakkattayam ss.19-23; Mad.Nambudris ss.18-20; Cochin Nayars ss.28-32; Cochin Marumaakkattayam ss.20-23; Cochin Nambudris ss.27-28 etc.; Tra.Krio Makkathayees ss.12-15; Cochin Mak.Thiyyas ss.23-41; Mad.Aliyasantana ss.19-23.

- (1) Tra.Nayars s.19; Tra.Ezhavas s.18, Tra.Nanjinnal Vellalas s.22; Tra.Malyala Brahmins s.17; Tra.Kshatriya ss.20-22; Cochin Thiyyas s.23, Mad.Marumakkattayam s.28; Mad.Nambudris s.21, Cochin Marumakkattayam s.24; Cochin Nambudris s.29; Tra.Krishnalvaka s.19; Mad.Aliyasantana s.25. The position and the share of the husband is, however, different in different enactments: amongst Nambudris he succeeds after the descendants and takes the whole of his wife's property; amongst the Travancore Ezhavas he shares equally with his wife's mother's tavazhi; amongst the Travancore Nayars and the Krishnavakas as well as the Madras Marumukkattayis he shares equally with the tavazhi of the mother's mother of his wife. Amongst the Nanjinad Vellalas both the husband wife take only a life-estate in each other's property in some cases - see ss.17 & 22; the principle of Hindu law has thus been engrafted upon the Malabar law so as to blend both of them into a complex admixture. The different provisions represent only the different stages of the struggle between the institution of marriage and the matriarchial system, and show the extent to which the former has gained preponderance over the latter.
- (2) Dr.J.D.M.Derrett: The Future of the Malabar personal law within the framework of the projected Hindu Code Bill - Kerala Law Times (Journal), 1952, pp.9-20 at pp.14-15.

standing this synopsis of the Malabar law. The first set is:-

- (1) The Travancore Ezhava Regulation III of 1100 (1925A.D.)
- (2) The travancore Nanjinad VellalaReg.Vi of 1101 (1926 A.D.)
- (3) Travancore Malayala Brahmin Reg.III of 1106 (1931 A.D.)
- (4) Cochin Thiyya Regulation VIII of 1107 (1932 A.D.)
- (5) Madras Nambudri Act XXI of 1933
- (6) Cochin Nambudiri Act XVII of 1114 (1939 A.D.)
- (7) Cochin Makkathayam Thiyya Regulation XVII of 1115 (1940 A.D.).

The second set is:-

- (1) Travancore Nayar Regulation II of 1100 (1925 A.D.)
- (2) Travancore Kshatriya Regulation VII of 1108 (1932 A.D.)
- (3) The Madras Marumakkattayam Act XXII of 1933
- (4) The Cochin Nayar Regulation XXIX of 1113 (1938 A.D.)
- (5) Cochin Marumakkattayam Reg.XXXIII of 1113 (1938 A.D.)
- (6) The Travancore Krishnavaka Marumakkathayee Regulation VII of 1115 (1939 A.D.)
- (7) The Madras Aliyasantana Act IX of 1949.

With the exception of the Travancore Ezhava⁽¹⁾ this division may be accepted as correct and sound. The following are the features which the enactments in the first set share in common with the general Hindu law.

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- (1) A distinctive feature of this division is that either in the case of a male or female her mother's mother and her tavazhi and all other remoter heirs in the matrilineal succession have no place at all in these enactments according to which succession ultimately devolves upon the descendants of the paternal ancestors in the case of a deceased male and upon the husband's relation in the case of a deceased female. This is not the

(Continued on the next page)

(A) In succession to the separate property of a male the line of heirs prescribed is based on the same principles as the line in Hindu law, namely, firstly it goes to the widow and the descendants of the deceased, then goes a degree in ascent and includes his father and mother, comes down to the nearer agnatic collaterals such as brother, his son etc. and then alternately takes a degree in ascent and descent.⁽¹⁾ Thus matrilineal preference is absent in these enactments.

(B) In succession to the separate property of a female her husband has been accepted as an heir and his heirs and relations are also included in the line. Thus in the case of a woman the tie of marriage is as relevant according to these enactments as according to Hindu law.⁽²⁾

The provisions differ from the general Hindu law in the

case with Ezhavas of Travancore - see infra. It is only 'makkathayam' property which is defined in s.4(11) of the Travancore Ezhava Regulation as 'property obtained from the husband or father by the wife or child or both of them, by gift, inheritance or bequest' which devolves upon wife and children - s.32; otherwise, all separate property of a male devolves equally upon the widow and the tavazhi of the deceased - s.16. However Ezhavas in Cochin are in a different position from that of Travancore Ezhavas as they are included in Makkathayi Thiyyas - Cochin Makkathayam Thiyya Regulation s.5.

- (1) The rough sketch-work of the line is: widow and lineal descendants together, father, mother, brothers and sisters, their children, father's father etc. The enactments for Madras and Cochin Nambudris and Cochin Marumakkathayam Thiyyas, being later, are more elaborate so that the provisions of these enactments and of General Hindu Law can more easily be compared; see Tra.Nanjinad Vellal ss.16-17, Tra.Mal.Brahmin s.15-16; Cochin Thiyya ss.21-29; Mad.Nambudri ss.18-20; Cochin Nambudri ss.27-28; Cochin Mak.Thiyya ss.30-45.
- (2) Nanjinada Vellala ss.22-24; Tra.Malayala Brahmins ss.16-18; Cochin Thiyyas s.23; Mad.Nambudri s.21; Cochin Nambudri s.29; Cochin Mak.Thiyyas s. . Amongst Nambudris the line of succession prescribed for property of an unmarried female is similar to the line prescribed in Hindu law for strīdhana of an unmarried woman - Mad.Nam.s.22; Cochin Nam.s.30.

following respects:-

(A) The widow as well as the daughter of a deceased male shares his separate property along with his son and there is no distinction between married and unmarried daughters except in the case of the Nambudris.⁽¹⁾

(B) The doctrine of representation applies to descendants of predeceased daughters as well as predeceased sons except in the case of Nambudris.⁽²⁾

(C) Unlike the Hindu law, all the heirs to the separate property of a male are, with the exception of his widow and mother, either his direct descendants, ascendants, or the direct descendants of his paternal ancestors in the male line so that persons like the maternal grandfather or maternal uncle, who succeed as bandhus ex parte materna in Hindu law, have no locus standi at all in these enactments.

(D) Many female heirs not recognised by the general Hindu law like sister, aunt etc. are able to inherit a male's property as his father's or father's father's descendants and all female heirs

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- (1) See the sections too on p. 587 note 1 . Widows or all co-widows together, sons and daughters take equal shares except in the case of Cochin Thiyyas and Cochin Makkathayam Thiyyas amongst whom she takes a small share in some cases - see Cochin Thiyya s.21; Cochin Makkathayam Thiyya ss.30-31.
- (2) See Nanjinad Vallala s.16 whereby widow has only a right of maintenance if sons or daughters also exist. See supra p.587 note 1 . For exception amongst Nambudris see Mad.Nambudri ss.18-19 and Cochin Nambudri s.27: According to both only predeceased sons can be represented by his issue, which can be only male in Madras and sons and unmarried daughter in Cochin. But amongst Cochin Thiyyas the doctrine is extended also to children of predeceased brothers and sisters who share with the living brothers and sisters.

take an absolute estate.⁽¹⁾

(E) There is a uniform line of succession for a female's separate property in which both sons and all daughters married or unmarried share equally; some of the blood-relations of the deceased like father, mother, brother, sister etc. are invariably interposed between the husband and his heirs who are in all cases ultimately entitled to take the property of a female.⁽²⁾ This is how these enactments stand in direct contrast with the general Hindu Law which prescribes different lines of succession by distinguishing either the category of strīdhana or the status of the woman or both.⁽³⁾

Coming to the second set of the enactments we find that although they admit the widow and children as heirs in the first instance to the separate property of a male and confer upon the husband the right to succeed to his wife's separate property⁽⁴⁾ they stand on a different footing from the above-noted enactments and general Hindu Law in as much as they disclose conspicuous traces of matrilineal succession, the distinctive features of which are:-

(I) In succession to a male's property his mother shares

(1) For an exception see Nanjinad Vellala s.17 whereby a widow takes only a life estate in some cases.

(2) Supra 587 note 2.

(3) Supra Chapter IV.

(4) Supra 585. It is to be quoted, however, that amongst the Cochin Nayers and the Madras Marumakkattayis it is only the lineal descendant in the female line of daughters, who are allowed to have a right to take by representation so that son of predeceased son or the son's son of the latter have no such right at all. The provision stands in contradistinction from the provision amongst the Madras Nabudris that direct descendants only in the male line of male predeceased children have a right to take by representation. See supra. This brings these enactments closer to matrilineal succession.

equally with his widows and issue and his father has to compete on equal terms with the tavazhi of the mother's mother of the deceased. Moreover, in the absence of the widow the mother is entitled to take the whole inheritance but in the absence of the mother the widow has to share equally with the mother's tavazhi.

(II) No paternal male ancestor of a deceased male except his own father is recognised as his heir and his remoter heirs are the tavazhies of his mother's mother, mother's mother's mother and so on in the ascending female line of his mother.⁽¹⁾

(III) Unlike as in the previous set of enactments the husband does not succeed wholly to the separate property of his wife, and immediately in the absence of her issue but he has to share with her mother's tavazhi amongst Travancore Kshatriyas, Cochin Nayars, Cochin Marumakkattayis, Madras Aliyasantanis and with the tavazhi of her mother's mother amongst Travancore Nayars, Madras Marumakkattayis and Travancore Krishnavakas.

and

(IV) With the exception of the husband the issue, succession to a female's separate property devolves exclusively upon her mother's tavazhi, mother's mother's tavazhi and so on in the ascending maternal line of tavazhies so that even her own father or husband's father is not an heir at all.⁽²⁾ Thus exclusion of all relations of

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- (1) For provisions to separate property of a female see Travancore Nayar ss.11-16, Travancore Kshatriya ss.15-17, Madras Marumakkattayam ss.19-24, Cochin Nayar ss.28-33, Cochin Marumakkattayam ss.20-23, Travancore Krishnavakas ss.12-16, Madras Aliyasantana ss.19-24. The Cochin Marumakkattayam is the farthest from Hindu Law in matrilineal succession as even the lineal descendants as well as the widow of a male have to share equally with his undivided heirs so that the heirs in the former group share only a moiety of the property of the deceased.
- (2) For provisions concerning succession to female's separate property see Travancore Nayar ss.17-20, Tra.Kshatriya ss.20-22, Mad.

(continued on the next page)

a female who are ex parte paterna as well as of all the relatives of her husband who are not also her own blood relations, forms a prominent feature of the line of succession to her property as laid down in these enactments.

A few important individual features of some of these enactments may be noted here in addition to those already noted on the basis of categorical division into two classes. The most important provision is to be found in the Madras Marumakkattayam Act and the Madras Aliyasantana Act which covers the case of a non-Marumakkattayi or non-Aliyasantani male who married a female governed by either of those acts and leaves heirs under his personal law as well as his widow, children and/or lineal descendants who would have been his heirs under one of these Acts had he been governed by the same. In such case one-half of his separate property goes to his personal heirs whereas one-half goes to his widow etc. who take all his property in the absence of his personal heir.⁽¹⁾

According to the Cochin Makkathayam Thiyya Act illegitimate children of a female are entitled to inherit the property of their mother as if they were her legitimate children.⁽²⁾ The provision, though slightly in advance of the general Hindu law, is by no means a novel one since it was already preceded by a similar provision in the Mysore Hindu Code.⁽³⁾

Marumakkattayam ss.26-29, Cochin Nayar ss.36-37, Cochin Mar. ss.24, Tra.Kris.ss.17-20, Mad.Ali.s.25 read with s.20.

(1) Mad.Marumakkattayam Act s.30, Mad.Aliyasantana Act.s.26.

(2) s.46.

(3) For the provision of which see infra.

The 'strīdhana' or varaśulka which, amongst the Nambudri brahmins, is given by a bride's father to the bridegroom or his father and which after a big controversy amongst the judges as to whether it belongs to the bridegroom or the bride was decided to be the exclusive property of the bridegroom, has been declared in Travancore to be the joint property of the husband and wife.⁽¹⁾ The provision is amicable since it provides a solution to the problem of finding a golden mean between a desire not to oppose the already existing custom of paying the 'breeding-bull price' and a desire to do justice to the woman for whose sake her father gives 'stridhanom'.⁽²⁾

After having discussed the matrilineal customary law we come to the Punjab customary law which, being based on a more or less strict theory of agnation, is utterly opposed to the former system. "In no country, throughout British India, is the reign of custom so paramount as in the Punjab. Here in village communities, among Hindus and Mahomedans, agriculturists and non-agriculturists, customs and usages regulate and determine the civil and municipal rights of the people much more than Statutes and Laws. Decisions by the highest court of the land abound in the recognition of such customs and usages."⁽³⁾ Custom in this province is the first rule of decision on all questions regarding succession, special property of females,

(1) Travancore Maliyala Brahmin Regulation s.21.

(2) It is to be noted that 'stridhanom' which is paid to the bridegroom or his parents by the bride's parents or their heirs becomes her own property amongst the Latin Christians of Travancore - Travancore Christian Succession Regulation II of 1092 (1916 A.D.) s.5 read with s.28. For more information about the same see Report of the Christian Committee Para.2 & s p.312-13 of the Regulation. For cases dealing with the point whether varaśulka becomes strīdhana see supra p.192.

(3) S.Roy: Customs and Customary Law T.L.L.(1908)p.462.

betrothal, marriage, divorce, dower, adoption, guardianship, wills, alluvion and diluvion, religious institutions etc.⁽¹⁾

The sources of ascertaining the customary law of the Punjab have been the traditions, text-books written by eminent scholars and judicial decisions. The traditions are recorded in the *Wajib-ul-arz* and the *Riwaj-i-am* which form settlement records and administration papers of the villages respectively. The statements made therein form a *prima facie*, though not an irrebutable, evidence of any custom in a particular village, district, community etc.⁽²⁾

Amongst the text-books on the Punjab customary law the earliest attempt appears to have been a book called 'Principles of Law' written by Sir Richard Temple in 1864 which passed under the name 'Punjab Civil Code'. It comprised rules drawn from a great variety of sources like Hindu law, Mahomedan law, the English law, the French law as well as from local customs and usages. The book which was circulated as a manual was accepted for a long time in Courts as a sort of semi-inspired volume of unquestionable authority.⁽³⁾

But in 1872 the Punjab Laws Act was passed whereby the Courts were required to follow the custom as a general rule of decision in matters concerning succession, marriage, adoption etc. and to apply Hindu law or Mahomedan law to cases where Hindus or Mahomedans respectively were the parties.⁽⁴⁾ In 1880 Bulnois and Rattigan

(1) W.H.Rattigan : Digest of Customary Law (1953)p.34.

(2) T.L.L.(1908)p.463.

(3) Rattigan pp.37-39.

(4) See sec.5 of the Act for the meaning and the scope of which see Rattigan pp.42-50.

wrote 'A Treatise on the Customary Law of the Punjab' in which the decisions of the Chief Court were collected and classified. Soon afterwards Tupper wrote 'Customary Law of Punjab' in which he incorporated the material gathered by the settlement officers of the province. These books were followed by admirable attempts by Ellis and Rose.⁽¹⁾ In the meantime many digests of the districtwise customary law had started being published.⁽²⁾

In 1915 an attempt was made by the Governor of the Punjab to prepare a code of the Punjab customary law which would have regulated the diverse provisions of the customary law. Both Ellis and Rattigan (junior) were members of the conference called for the purpose of forming a recommendatory bill. But whereas the former was in favour of such legislation the latter was not and it seems the government was impressed by the latter's view and deserted the attempt.⁽³⁾ Rattigan's work, however, has gone through several editions at the hands of many eminent scholars including his own son and in 1940 deserved a compliment from their Lordships of the Privy Council as being a 'book of unquestioned authority in the Punjab'.⁽⁴⁾ In an

(1) T.P.Ellis : Notes on Punjab Custom; H.A.Rose : A Compendium of the Punjab Customary Law (1911).

(2) See the various digests referred to in Rattigan pp.243-275.

(3) See the Report on the Punjab Codification of Customary Law Conference 1915. For the opinion of Ellis see *ibid* p.18; for the opinion of Sir Henry Rattigan see his letter to Hon.F.Robertson, judge, Chief Court, Punjab printed in *ibid* pp.90-91 in which he expresses an apprehension that the proposed legislation might ride roughshod over the custom of the people. His opinion is in accord with that of his father who agreed with the French historian Voltaire in maintaining "that the more vast a state is in size and composed of different peoples, the more difficult it becomes to unite all together by one and the same jurisprudence". - Preface to Rattigan's 1st edition.

(4) *Mst.Subhani v. Nawab* A.I.R.1941 p.c.21 at 23.

attempt to give a synopsis of the Punjab customary law the present writer has placed great reliance on the celebrated work of Rattigan.

The Punjab customary law which applies generally to both Hindus and Mahomedans⁽¹⁾ is essentially non-brahmanical in character.⁽²⁾ It is unsacredotal, unsacreamental and secular.⁽³⁾ Whatever may have been the growth of the law of property, namely, whether it has devolved successively on the basis of the family, the house, and the tribe as Sir Henry Maine would suggest⁽⁴⁾ or on the basis of the tribe, the house and the family which, according to Tupper, is the case in the Punjab,⁽⁵⁾ there is no doubt that on account of the village communities being a living institution in the Punjab, instances of collective ownership of land by men, whether united by common tie of kinship or not, are common enough to form one of the distinctive features of the system of this customary law.⁽⁶⁾ The village communities in the Punjab being usually based on a strong sense of family origin there is no wonder that like Romans their notion about property and its devolution is strongly impressed by agnatic kinship. Landed property, therefore, passes on to those heirs who are best able to manage it and to those who stand least chance of severing their connection with ^{the} tribe. In such a system cognates and females have

(1) T.L.L.1908 p.463.

(2) Tupper vol.II pp.82-87; Baden Powell : The Indian Village Community (1896) pp.80, 102.

(3) Tupper vol.II.p.87.

(4) Early History of Institutions (1897)pp.77-82.

(5) Tupper vol.II.pp.7-10; see also Baden Powell : Land Systems in British India vol.I p.110 referred to in Rattigan p.13; Rattigan p.227.

(6) For different kinds of collective ownership in villages see The Indian Village Community pp.404-406; for the stages in the process of transition from collective ownership to individual ownership in the Punjab see Tupper vol.II p.1.

but a meagre chance of becoming heirs; the former because they are as good as strangers who would destroy the harmony and the homogeneity of a clan and the latter because they become strangers by going into other clans after marriage.⁽¹⁾

The collective ownership of land being at the basis of the Punjab customary law, in the case of members of an agricultural tribe following agriculture pursuits there is a presumption that the customary law and not their personal law applies to them.⁽²⁾ The same presumption arises in the case of non-agricultural tribes following agricultural pursuits⁽³⁾ but not if they are not following agricultural pursuits.⁽⁴⁾ In the latter case they are governed by their personal law. Similarly there is presumption in favour of the applicability of the personal law in the case of agricultural tribes who have left their original occupation and have adopted non-agricultural pursuits.⁽⁵⁾

In cases wherein presumption arises in favour of the customary law, the personal law is not totally excluded and has to be resorted to if a particular custom in a case fails to be proved;⁽⁶⁾ but it seems that the Court would be bound to make an inquiry into the probable existence of custom especially if it is alleged by one of the parties to have been existing.⁽⁷⁾ The gaps in the customary

(1) For the agnatic theory see Tupper vol.II pp.70-77; Sir Charles Roe: Tribal Law in the Punjab pp.28-3; Rattigan pp.232-33.

(2) Rattigan pp.65-68. This statement and the following ones about applicability of customary law are only general. For a detailed analysis see Rattigan pp.34-87.

(3) Ibid p.75-76.

(4) Ibid p.74-75.

(5) Ibid p.68-73.

(6) Ibid p.44-50.

(7) Ibid pp.50, 59-60.

law are to be filled in by the relevant provisions of the personal law.⁽¹⁾ It has been noted that for a custom to be valid under Hindu law it must be ancient, certain, invariable, and not unreasonable, immoral or opposed to public policy. But in the Punjab where the whole process of the development of the law of property is still perceptible in its changing patterns it has rightly been held that in this province a valid custom need not necessarily be ancient; it is sufficient if it is shown that it generally prevails amongst the members of the tribe to which the parties belong and is uniformly observed by them.⁽²⁾ But it seems it ought to be invariable.⁽³⁾

With regard to succession to a male's property "There are four leading canons governing succession to an estate amongst agriculturists. First, that male descendants invariably exclude the widow and all other relations; second, that when the male line of descendants had died out, it is treated as never having existed, the last male who left descendants being regarded as the proprietors (propositus ?); third, that a right of representation exists, whereby descendants in different degrees from a common ancestor succeed to

(1) Ibid pp.51-52.

(2) Ibid pp.155-56.

(3) Ibid pp.155-56. But in *Daya Ram v. Soheli Singh* (1906) 110 P.R. 390 F.B. on which Rattigan relies for support it was actually admitted that it 'need not be absolutely invariable.' See also Ellis pp.4-5 wherein he compares the essentials for validity of an English and an Indian custom and on p.5 remarks: "Custom

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the share which their immediate ancestor, if alive, would succeed to; fourth, the females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issue, chiefly amongst tribes that are strictly endogamous."⁽¹⁾

The detailed working of these rules is as follows:- After a man's death his sons are entitled equally to his property together with the male representatives of the pre-deceased sons. In default of all male descendants the widow succeeds whether to the joint or the separate property of the deceased but takes only a life-interest; then the mother, if not remarried, succeeds. In default of the mother the daughter comes in and succeeds to the separate property usually in preference to the collaterals but not to the joint property of the deceased to which the collaterals succeed in preference to the daughter. Daughter's son, sister and her son etc. are not at all recognised as heirs. But a khana-damad or a son-in-law who comes to stay with his sonless father-in-law was till recently recognised as heir in default of the male issue. In default of all the collaterals the property devolves upon the proprietary body or the government as the case may be in accordance with the different customary rules applicable to such property.⁽²⁾

These details of the rules of succession display a strong influence of the agnatic theory. The widow succeeds to both the joint and separate estate of her husband since after all she takes

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- (1) Rattigan p.233; also quoted in T.L.L.1908 p.464. The bracketed word is inserted by comparing this with the other editions of the same work i.e. 7th edi.(1909)p.14; 11th edi.(1929)p.59.
 (2) The gist of Rattigan's chapter on succession and inheritance.

only a life-interest in both and after her death the property is bound to return to the agnatic relations of the deceased. The males related through females like the daughter's son or the sister's son etc. are entirely excluded to prevent the property from falling into the hands of another family. Though a nearer blood-relation like sister is excluded, a khana-damad has an important place in the line of succession; for he stays in the family and consequently is genuinely interested in cultivating the lands of the family to get his food (khānā) which he enjoys in common with his parents-in-law.⁽¹⁾ Thus the Punjab customary law represents a stage much earlier than the stage of Hindu law as known to the commentators. It is noteworthy that these general rules of succession are followed in almost all the leading aboriginal tribes of India with one prominent exception, namely, that amongst many of them the widow has no right at all except that of maintenance.⁽²⁾

As regards woman's property Rattigan mentions the following general rules: Amongst the agriculturist tribes wife's personal

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- (1) For fraternal polyandry in some of the districts and rules of succession amongst such polyandrous people see Rose's Compendium of the Punjab Customary Law pp.49-52. It is to be noted that unlike as amongst the Nayars, polyandry in the Punjab did not give rise to matrilineal succession there.
- (2) See infra.

property usually merges into that of the husband who is entitled also to all her earnings.⁽¹⁾ Ornaments made up by the husband and given to the wife subsequent to the marriage cannot ordinarily be disposed of by her against the wishes of her husband. Upon the death of the wife during the life-time of the husband the latter succeeds to all such property of the wife of which she was possessed at the time of her death. Where the husband has predeceased his wife her special property devolves upon the sons and then upon the male collaterals of the last full owner if it is immoveable; if it is moveable like ornaments etc. the daughters have a preferential claim and unmarried daughters usually exclude the married ones.⁽²⁾ It has already been shown that their Lordships of the Lahore High Court had doubted the validity of the statement made in this last sentence and had decided succession to such property under the rules of the general Hindu law and not under customary law as expounded by Rattigan.⁽³⁾ But as the

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- (1) Rattigan pp.1055-56 relying on Tupper vol.II.p.158, vol.IV p.145 and vol.V p.73. At the same time Rattigan mentions that immoveable property purchased by a woman out of the proceeds of the moveable property belonging to her such as the ornaments given by the husband etc. constitutes her 'special property' but that immoveable property purchased by a widow from the income of her husband's property which she has inherited from him presumably becomes a 'capitalized part' of the inheritance. So it seems a wife can have both moveable and immoveable property with incidents of what we may call *strīdhana* in ordinary Hindu law. Really speaking this does not appear to merge in husband's property.
- (2) Rattigan pp.1056-58; the husband appears to be the most preferential heir also according to Ellis p.102-3. For special customary rules about devolution of a prostitute's property see Rattigan pp.490-91; Ellis p.103.
- (3) See ⁴⁵⁸⁻⁵⁹supra. *Gurdial Singh v. Bhagwan Devi* (1927)8 Lah.366 followed in *Kehar Singh v. Attar Singh* A.I.R.(1944)Lah.442. It is surprising to find that Tekchand J. who in the former case denounced Rattigan's book as being of no authority unless supported by some original evidence like *Riwaz-i-am* etc. now praises the same book - apparently because the book elicited a very

(Continued on the next page)

later editions of Rattigan's book have usually been supported by the statements in the Riwaz-i-am as well as by the observations of other authors like Tupper, Ellis etc. and as even their Lordships of the Privy Council have accepted Rattigan's book as being of unquestionable authority in the Punjab⁽¹⁾ it is hoped that much more weight would be given to Rattigan's statements than has been given in the past. Moreover it is important to note that not only under the Punjab customary law but under almost all other customary laws of India excepting, of course, the customary matrilineal law the husband's position is much stronger than it is in the Śāstra: during coverture he exercises complete control over her property and after her death he is usually the first preferential heir.⁽²⁾

We then come to another system of law, namely, the Jaina law which is based upon the scriptures of the Jains who form an independent religion in India. It is well-known that long since the Jains have always been held by the Anglo-Indian courts to be governed by ordinary Hindu law subject to any custom to the contrary.⁽³⁾ Their attempts to get recognition in the eyes of the law as an independent community as such have always failed⁽⁴⁾ probably because there is at least an apparent similarity between the Jaina and the Hindu systems of religion or because the Jains religious leaders were reluctant to

favourable remark from their Lordships of the Privy Council - as having been, since its first edition, 'the locus classicus' on the Punjab customary law. - See his foreword to Rattigan's 1953 edition.

(1) Supra p. 594.

(2) See infra.

(3) Supra.

(4) For cases see supra pp. 148, 417.

produce before the courts cogent evidence about the existence of their scriptural authorities. In 1926, however, a Jaina scholar Mr. Champat Rai Jain published a book called 'The Jaina Law' which appears to challenge the hitherto accepted position, namely, that the Jains are to be governed by the general Hindu law.⁽¹⁾ After perusing the book one feels that ~~although~~ the Jains scriptural law has not been treated as being on a par with other personal laws like Hindu law, the Mahomedan law etc. there is no reason why it should not now be treated at least as a system of customary law like the Marumakkattayam law, the Punjab customary law etc.

For his enunciations of the Jain law Mr. Jain relies on six leading Jaina works called the Ādipurāṇa, the Vardhamānanīti, the Arhannīti, the Indranandi Jinasamhitā, the Bhadrabāhusamhitā and the Traivarnīkāchāra which, according to him, were compiled between the ninth and the seventeenth centuries A.D.⁽²⁾ Some of these works are in Sanskrit and there can be no doubt that they follow the general terminology and tenor of the Hindu Dharmaśāstras. But it is to be noted that the Jaina law is much more favourable to women than the accepted provisions of the Hindu law and so the salient features of its provisions about succession may be specially noted here.

The order of succession to male's property is his widow, sons and other male descendants in the male line, brother, brother's son, nearest bahdhus, gotrajas, castemen and the King.⁽³⁾ As in the

(1) Champat Rai Jaina : The Jaina Law (1926). See ibid at pp.21-22 for difference in general between the Jaina law and ordinary Hindu law. The first book on Jaina law seems to have been published in 1916 by one Rai Bahadur Babu Jagminder Lal Jaini - see ibid p.9.

(2) Ibid pp.3-6.

(3) Ibid.p.77.

Burmese customary law,⁽¹⁾ the widow is the most preferential heir.

She succeeds despite the existence even of a son, takes an absolute estate in the inheritance and succeeds either to joint or separate property of her husband.⁽²⁾ All females take an absolute interest in inherited property.⁽³⁾ A female's property is divided into two categories, namely, strīdhana and the rest. Strīdhana constitutes adhyagni, adhyavāhanika, prītīdāna (prītīdatta in Hindu law) and audāyika or saudāyika with the same import for these terms as in ordinary Hindu law. Strīdhana goes first to daughters whether married or unmarried, then to sons in default of whom it devolves upon the husband. The step-son is also recognised as an heir. It is specially important to note that the father or his heirs are not at all entitled to a married woman's strīdhana. The unmarried girl's strīdhana goes to her brothers as in Hindu law.⁽⁴⁾ A woman's property other than her strīdhana devolves successively upon her husband, sons and other male descendants in the male line, and husband's brothers and nephews.⁽⁵⁾

It is thus clear that although the Jaina law follows the broad features of the Hindu law it shows marked deviations from the hitherto accepted rules of the latter. It is interesting to note how almost each deviation is counterbalanced by another deviation: for instance, the widow gets an absolute estate in her inheritance from the husband but by introducing for such inherited property, if

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- (1) See infra p.610.
 - (2) The Jaina Law p.80.
 - (3) Ibid pp.81,82,84,86.
 - (4) Ibid pp.83 & 89-93.
 - (5) Ibid p.79.

it remains unexpended and (presumably) in specie, a line of succession different from the one prescribed for strīdhana sufficient care has been taken to see that the property does not pass out of the hands of the husband's family. Similarly strīdhana devolves upon daughters without any distinction between a married and an unmarried daughter but in default of both succession devolves not upon the daughter's son but upon the son so that the preferential right of the married daughter is limited to herself and not allowed to extent to her issue.

On the basis of a proof of a custom to that effect it has been recognised by the courts that a Jain widow takes an absolute estate in the non-ancestral property which she inherits from her husband.⁽¹⁾ The advantage has not been so far extended - and for obvious reasons - to other female heirs.⁽²⁾ In the only reported case on strīdhana in which Mr. Jain's book was produced as an authority their Lordships of the Nagpur High Court refused to accept the authority of the Bhadrabāhusaṃhitā according to which both married and unmarried daughters succeed simultaneously to their mother's strīdhana and on the principle of stare decisis followed the rule that the Jains are governed by Hindu law subject to proof of a specific custom to the contrary.⁽³⁾ Considering that in all the Jaina scriptures published by Mr. Jain there is a conscious attempt at brevity, simplicity and uniformity in rules of succession the

(1) For a discussion about the case-law see supra pp. 148-49 (Chap. II).

(2) The reason is that the widow's right has been admitted on the basis of a specific custom which can not be extended by process of analogy.

(3) See *Jaiwanti v. Anandi* (1937) A.I.R. 1938 discussed supra pp. 417.

to be
 decision appears lamentable; for, the Court failed to realise that the scriptural law of the Jains which was laid down much later than many of the leading commentaries of Hindu law is, to say the least, the best possible evidence of the growth of their customary law which is, in some parts, contrary to Hindu law. It is high time that the question of applicability of Hindu law to Jains were radically reviewed and reconsidered in the light of the scriptures of the Jains themselves.

It is well-known that the Hindus who went from India to the neighbouring countries carried along with them their scriptures and law as well as their culture. It is necessary, therefore, to consider here the three reputed non-Indian systems of customary law with a view to ascertain how far, if at all, Hindu law has influenced them. The three systems are known as the Buddhist^h customary law which is prevalent in Burma, the Thesawalamai or the customary law of the Tamils in Ceylon and the Kandyan law which was once the customary law of the Sinhalese people of Ceylon.

The most important amongst these is the Burmese Buddhist law or the Burmese customary law which, subject to the changes brought about by a few enactments, still applies to all Buddhists in Burma in matters regarding succession, inheritance, marriage, caste or religious usages and institutions.⁽¹⁾ The sources of that law are three: (a) The texts, namely, the Dhammathats and the Vinaya; (b) Custom; (c) and the judicial decisions.⁽²⁾ The Dhammathats are

(1) Burma Laws Act XIII of 1893 s.13; O.H.Mootham p.3. For detailed information about the Dhammathats see U.Shwe Baw: Origin and development of Burmese legal literature; a thesis submitted for the degree of Ph.D.(1955) of the University of London, chap.3.

(2) Mootham p.3.

thirty-six in number and date from the eleventh century A.D. They are not codes or digests of laws but contain records of customs and decisions concerning disputed points. They are more like collections of illustrations to a section and are given without any apparent logical arrangement or division.⁽¹⁾ There being a confluence in Burma of both the general Hindu law and Buddhistic customs the Dhammathats bear analogies with the Hindu law on many points though discrepancies between the two are by no means non-existent.⁽²⁾ Vinaya is a name given to the five texts which govern the conduct of the monks and regulate ecclesiastical matters. Although the Dhammathats form an important source of information about customs the rapidly changing conditions in Burma have rendered them an unsafe guide in ascertaining the present position of the customary law which it is better to ascertain from the modern usage of the people themselves.⁽³⁾ The judicial decisions form perhaps the most important source of the Burmese customary law as they fill in, by inductive reasoning, the lacunae in the customary law and also restate the law in the changed conditions of the present.⁽⁴⁾

We may begin our discussion about the Burmese customary law

(1) Mootham p.4.

(2) Ibid pp.4-5. But see Dr.Shwe Baw's summary of the thesis wherein the author contends that the Dhammathats borrowed only the method but not the substance of the law from the Hindu Śāstras.

(3) Mootham p.6. See the comments of Page C.J. in *In re Maung Thein Maung v. Ma Kywe* (1935)13 Ran.412 at 419: "Much of the ancient customary law of the Burmese people to be found in the Dhammathats has become anachronistic, and cannot intelligently be applied to the Burmans of the present day; for the facts and the conditions upon which many of the rules laid down in the Dhammathats rest find no counterpart in the conditions and customs that exist in modern Burma, and under which the people now live and move and have their being."

(4) Mootham pp.6-7.

by making a very brief survey about the provisions about marriage and inheritance. Marriage, under the Burmese customary law is a civil contract without any religious or sacramental element in it.⁽¹⁾ Polygamy among the Buddhists is legal though it is looked upon with disfavour.⁽²⁾ A husband may also enter into and maintain conjugal relations with a woman whose position falls short of a 'superior' wife. Such woman who is known as an 'inferior' wife has a position which is higher than that of a mistress but lower than that of a superior wife.⁽³⁾ Amongst the Burmese the husband and the wife manage their concerns together and it is not unusual to find that in business the wife takes more active part than the husband.⁽⁴⁾

Property under this law is divided into three main categories:

- (i) Payin or atet i.e. property which belonged either to the husband or wife before marriage;
- (ii) Lettetpwa i.e. property which is acquired during marriage by the husband or the wife by succession or individual exertion.

(1) Mootham p.14; Shew Baw p.287.

(2) Mootham pp.16-17. For comparison between the earlier and the present position of the law on this point see Baw pp.308-12.

(3) Mootham p.17; Baw pp.395-97. For comparison between the provisions about marriage in Burmese law and Hindu law see Baw pp.312-334; but the Sanskrit terms mentioned therein have undergone terrible transformation at the hands of the author and the position stated about the devolution of strīdhana is not entirely correct.

(4) But see Baw p.305 wherein the author points out that according to the Dhammathats the husband, after marriage, gains complete control over the property of the wife but that the wife has no control over the husband's or the joint property. Pointing out that the Anglo-Burmese courts rejected these texts as being obsolete he, however, accepts that by the commencement of the British period in Burma the wife had usually become the manager of the family property and business.

(iii) Nhapazon i.e. property acquired by both the spouses by joint exertion during marriage.⁽¹⁾ Payin brought to the second marriage includes property acquired during the first marriage and also during the time between the termination of the first marriage and the time of the second marriage.⁽²⁾ There is a rebuttable presumption that the property purchased by one of the spouses during marriage with the help of his or her payin has become nhapazon.⁽³⁾ The profits of payin and nhapazon become nhapazon but profits of lettetpwa remain lettetpwa.⁽⁴⁾

As regards rules of succession the Burmese customary law is quite remarkable in the sense that both husband and wife have exactly the same rights in each other's property and the rules of inheritance as well as the line of succession applicable to the property of a male and female are the same.

The property of marriage consists of the lettetpwa and nhapazon of both the spouses and apparently includes payin brought to the marriage by either of the spouses.⁽⁵⁾ The husband and wife both have, during the continuance of marriage, a common interest in the property of marriage; they own it as tenants-in-common with vested rights in their individual shares.⁽⁶⁾ Each one of the spouses has a

(1) Mootham p.8; Baw p.370.

(2) Mootham p.9.

(3) Ibid p.9.

(4) Ibid p.10. Kanwin and Thinthis are two other minor kinds of property. Kanwin is property given by the bridegroom to the bride at the time of the marriage and belongs to her probably as her peculiar property - Baw pp.370-71.

(5) Mootham p.29.

(6) Ibid p.27.

one-third share in the payin and lettetpwa by succession of the other spouse and one-half share in the lettetpwa individually 'acquired' by the other spouse as well as in the nhapazon.⁽¹⁾ The interest of each of the spouses is alienable⁽²⁾ and liable to attachment under a decree.⁽³⁾ On partition upon divorce by mutual consent both the spouses take the shares above stated except for the fact that generally each party takes the whole of the payin which she or he brought to the marriage.

The three fundamental rules of inheritance are the rule of intestacy, non-ascent of inheritance and the predominance of propinquity.⁽⁴⁾ A Burmese Buddhist is incapable of making a will and his undisposed~~of~~ property devolves upon his death, in accordance with the rules of the customary law.⁽⁵⁾ According to the second principle the inheritance does not ascend so long as there are any descendants; where the deceased has died without leaving any descendants it may ascend but not more than what is absolutely necessary.⁽⁶⁾ The only prominent exceptions to this rule ~~are~~ the right of the surviving spouse to take the property of the deceased spouse and the right of the brothers and sisters of an unmarried child who has died after its parents but before the partition of their property to take the property of such child.⁽⁷⁾ According to the rule of propinquity a

(1) Ibid p.31.

✓Ibid p.32. (2)

(3) Ibid p.33.

(4) Ibid p.69; Shwe Baw p.384.

(5) Mootham pp.69-70; for detailed discussion see Shwe Baw pp.384-87

(6) Mootham p.71; Baw pp.387-89.

(7) Mootham pp.71-72.

nearer heir would exclude a more remote one. Thus children or grandchildren exclude great-grandchildren; or a brother excludes the children of deceased brother.⁽¹⁾ The most prominent exception to this is that brothers and sisters of a deceased are preferred to his parents.⁽²⁾

The general order of succession, therefore, is:-

- (i) firstly, the surviving spouse subject to the share of an orasa;
- (ii) secondly, the descendants;
- (iii) thirdly, the first line of collaterals, namely, brothers and sisters;
- (iv) fourthly, the parents;
- (v) fifthly, the second line of collaterals, namely, uncles, aunts etc.⁽³⁾

Partition of the property of a person may be claimed by his heirs after that person's death or remarriage.⁽⁴⁾ The general rules about partition are as follows:-

(A) After the death of either of the spouses the surviving spouse takes the whole of the estate of the deceased spouse to the exclusion of all others.⁽⁵⁾ The only exception is that of an orasa who, in some cases, takes one-fourth of the property.⁽⁶⁾ There are

(1) Ibid pp.73-74.

(2) Ibid p.74; Baw pp.389-93 should be consulted for a discussion about this rule.

(3) Mootham p.75. But see Baw p.393-94 where the line given on the basis of the Dhammathats is the surviving spouse, descendants, parents or brothers and sisters, grandparents, descendants of brothers and sisters, uncles and aunts, descendants of uncles and aunts etc.

(4) Mootham p.86; but see Baw pp.408 wherein these conditions have been enlarged into three.

(5) Mootham p.103; Baw p.408.

(6) For orasa and his share see Mootham pp.90-102.

two exceptions to this rule. The property of a spouse which is in possession of his or her parents who stay with the couple will pass on to such parents and not to the surviving spouse. Similarly when a man simultaneously has two or more wives the children of either wife and not the husband are entitled as heirs to her estate on her death.⁽¹⁾

(B) If the surviving spouse dies shortly after the death of the other spouse the relatives of each would severally succeed to the moiety of the joint property of the couple.⁽²⁾

(C) The whole of the estate of the surviving parent who has not remarried till his or her death, devolves upon the surviving children and children of the pre-deceased children.⁽³⁾

(D) On remarriage of the surviving parent the children by his or her former marriage take the following shares from his or her estate:-

(i) The eldest child takes one-fourth share if he or she has already not taken the share of an orasa.

(ii) The younger surviving children collectively take one-fourth share.

(iii) An only surviving child takes one-half share.⁽⁴⁾

(E) On the death of the common parent after remarriage and leaving the step-parent surviving the partition takes place as follows:-

(i) From the payin brought to the second marriage by the

(1) Ibid pp.103-5; for exceptions see Baw p.409.

(2) Mootham pp.106-7; Baw pp.410-11.

(3) Mootham pp.107-8.

(4) Ibid p.109.

common parent one-fourth goes to the surviving parent and three-fourth to the children by former marriage.

(ii) In nhapazon the step-parent gets seven-eighths or five-sixth share respectively depending upon whether there are children by the second marriage or not respectively. The rest is taken by the children of the first marriage.

(iii) Lettetpwa of the second marriage is divisible equally between the surviving step-parent and the children of the first marriage.⁽¹⁾

(F) On the death of a common parent after remarriage and after the death of the step-parent the rules of division of the common parent's property amongst his or her children by two marriages are as follows:-

(i) If the step-parent does not bring payin to the marriage and no property is acquired during the second marriage, the payin which the common parent brought to the second marriage would devolve upon the children of the first and second marriage respectively in three-fourth and one-fourth shares respectively. Otherwise the whole would pass on to the children of the first marriage.

(ii) Lettetpwa {acquired' by the common parent during the second marriage would devolve equally upon children by both marriages.

(iii) In nhapazon the children of the marriage during which the nhapazon to be divided was acquired, take double the share of the children of other marriage or marriages.⁽²⁾

(1) Mootham pp.111-13; Baw p.414.

(2) Mootham p.113-15; Baw pp.416-17.

(iv) The whole of the property of the second marriage, shall, in the absence of children of that marriage be divided equally amongst children of the previous marriage or marriages of either spouse. (1)

A few more particulars of the Burmese law worth noting are as follows:-

(i) An inferior wife living with her husband is entitled to two-fifth of his estate. The one not living with her husband is not entitled to any inheritance but may probably retain only so much of her husband's property as has passed into her possession. (2)

(ii) An illegitimate child is ordinarily not entitled to inherit especially in the presence of the legitimate ones; however, it appears that in one case illegitimate children were treated as being on par with step-children. (3)

(iii) Step-children and step-grandchildren exclude the collateral blood-relations except in succession to undivided ancestral property in succession whereto they share with the latter in moieties. (4)

(iv) A physically or mentally incompetent child is competent to inherit and takes a full share. (5)

(v) By adoption a person loses his right of inheritance in his natural parent's property; by divorce of one's parents one loses one's right in the property of the parent with whom he or she ceases

(1) Mootham p.116.

(2) Ibid p.78.

(3) Mootham p.76; but see Baw pp.394-98 in favour of illegitimate children.

(4) Mootham p.83; Baw p.397.

(5) Mootham p.82; Baw pp.397-99.

to live after such divorce. A person loses his right in another person's property also by his deliberate intention to sever family ties with such person whose property he may otherwise claim as heir.⁽¹⁾

Thus the provisions of the Burmese customary law differ widely from the śāstric provisions of Hindu law in as much as, for instance, there is no distinction between succession to a male's and a female's property or between a male and a female heir or between a physically or mentally defective heir and a normal heir. But the core of this custom represents the most archaic provisions of Hindu law: the rules about remarriage and divorce show that the provisions of the śāstra which became obsolete in India continued to influence the people in Burma. The rules of succession show that Bṛihaspati's text preaching unity of husband and wife⁽²⁾ has been carried out in Burmese law to a perfection which was never anticipated even by the śāstric law. At the same time we can see the influence of another text of Bṛihaspati wherein he preaches the identity of oneself with one's own progeny:⁽³⁾ the surviving spouse inherits the whole property of the deceased spouse but subject only to the existing though dormant right of the children who are entitled to get their share upon remarriage of the surviving spouse. The Śāstra probably noticed the danger of carrying into perfection the doctrine of the identity of husband and wife, for, as we have already seen, this doctrine, when coupled with the customs of divorce and remarriage, would inevitably lead to innumerable complications in intestate succession.

(1) Mootham pp.117-20.

(2) Supra pp. 57-58.

(3) Supra p. 58.

In Ceylon five different systems of law were given a Royal sanction during the British regime.⁽¹⁾ However, amongst the systems of customary laws of Ceylon the Thesawalamai stands as the most comprehensive one⁽²⁾ and applies to the Tamils in Ceylon who, by their total strength of approximately 1,400,000 persons, form a considerable portion of the Ceylonese population.⁽³⁾ There is no evidence of the history of the Thesawalamai before the Portugese period although it is known that Tamil kings of the Cōla dynasty rules Ceylon from the twelvth century.⁽⁴⁾ Dr. Tambiah says that there have been two waves of Tamil immigrants from India to Ceylon: the first one carried along with it the Marumakkattayam law of the Malabar whereas the second one took Ordinary Hindu law to Ceylon as a result of which the Thasawalamai stands as a peculiar blending of the two systems though with less influence of the ordinary Hindu law.⁽⁵⁾

Very scanty information about the rules of the Thesawalamai during the Portugese period is available⁽⁶⁾ but in 1707 during the Dutch regime the rules of the Thesawalamai were officially collected by one Claas Izaacs and came to be known popularly as the code of Thesawalamai.⁽⁷⁾ The British also accepted the same as the governing customary law of the Tamils of Ceylon and even today it retains the

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- (1) S.Katiresu : A handbook of the Thesawalamai or the customary law of the province of Jaffna p.4.
 - (2) H.W.Thambiah : The laws and customs of the Tamils of Ceylon p.22.
 - (3) Ibid p.1. The Ceylonese Tamils and Indian Tamils together form one-third of the population of Ceylon.
 - (4) Ibid p.22.
 - (5) Ibid p.23.
 - (6) See rules from De Queroz's 'Conquista De Ceylão' stated in Thambiah p.23.
 - (7) Ibid pp.17, 25 etc.

Addition to note 2:

See also by the same author The law of Thesawalamai, Tamil Culture 1958 pp.386-408.

same position subject only to the changes brought about by recent legislation.⁽¹⁾ However, we are concerned here only with the original customary law and not with the later legislative development.⁽²⁾

According to the code property is divided into three kinds, namely, mudusam, chedanam (strīdhanam?), and thediyattam. (~~tadīyāy~~ ~~attam?~~). The first one represents the hereditary property, the second one is the dowry property and the third, the acquired property. Hereditary property is one which is acquired by either of the spouses. Dowry is that property which is given to a bride at the time of her marriage by her parents or brothers. Acquired property represents separate property acquired during coverture by either of the spouses.⁽³⁾ A wife's inherited property is, like her dowry property, her separate property. Similarly gifts to a woman, money acquired by selling dowry lands etc., constitute a woman's separate property.⁽⁴⁾

Father's inherited property devolves upon sons to the exclusion of daughters. Daughters are given dowry out of their mother's property. The rest of the property of both the spouses devolves equally upon sons and undowered daughters.⁽⁵⁾ It will thus be seen that dowry which is really advancement by way of portion to daughters plays an important part in intestate succession according to the Thesawalamai. During the Dutch regime the law appears to have become more favourable towards the daughters; for, during the Portugese

(1) The code was considerably modified by the Matrimonial Rights and Inheritance Ordinance (Jaffna) Ord. 1 of 1911 and Jaffna Matrimonial Rights and Inheritance Amendment Act of 1947 - Thambiah p.31.

(2) See Katiresu's book for a complete reprint of the code.

(3) Katiresu p.8; Thambiah p.36.

(4) Katiresu p.9.

(5) Katiresu pp.21-22; Thambiah p.36.

period daughters could get dowry only from the dowry property of their mother and not from her other property.⁽¹⁾ If a married woman dies childless her dowry property reverts to her own family.⁽²⁾ It devolves first upon her married sisters and in their default upon her brothers. But in some cases the mother takes possession of the property according to custom and retains it during her life-time.⁽³⁾

Ganapathi Iyer rightly compares the three kinds of property mentioned in the Thesawalamai with the three kinds of property known to Hindu law, namely, ancestral property, strīdhana, and self-acquired property.⁽⁴⁾ The similarity in nomenclature as well as in the broad incidents of the divisions of property in these two systems discloses an evidence of a common bond between the two. Dr. Tambiah, however, makes two ridiculous suggestions namely, that chedanam has a parallel in the Marumakkattayam law and that it "originated when a new household branched off from the Thavazhi illom known to the Marumakkattayam Law." Secondly he suggests that the conception of strīdhana which was "developed later in order to create the separate property of the woman" had its foundation in the customary law of the Thesawalamai.⁽⁵⁾ Now that we have seen the working of the Marumakkattayam system as well as the history of the development of strīdhana it is

(1) De Queroz's *Conquista De Ceylān* referred to in Tambiah p.24. This continuity in hereditary transformation of the mother's property into her daughter's property in the female line bears a very close resemblance to one of the oldest provisions of Hindu law given by Baudhāyana: "Māturalaṅkāraṃ duhitarah sāmpradāyikam bhajerananyadvā." - Bau.2.2.49 supra. For comparison see infra. (2) Ibid.

(2) Katiyesu p.11.

(3) Tambiah p.38. This may well be connected to the two interpretations of Gau.28.26-7 according to which the Śulka of a daughter devolves upon uterine brother or the mother. See supra.

(4) Iyer's *Hindu Law* vo.I p.36 referred to in Tambiah p.36.

(5) Tambiah p.36-37.

not necessary here to show at length how baseless these statements are.⁽¹⁾

Kandyan law is the indigenous customary law of the Ceylonese people and in some respects shows a collateral affinity towards ordinary Hindu law.⁽²⁾ There are two kinds of marriage under the Kandyan law, namely, *dīga* and *binna*; in the former the wife goes to stay with her husband whereas in the latter the husband goes to stay with his wife, either because her parents are rich or because she herself has inherited a considerable amount of property from either of her parents.⁽³⁾ Thus there can be a *binna* marriage on father's or mother's property depending in each case upon whether the daughter's financial strength depends upon her paternal or maternal wealth. Divorce can be had at the instance of either party.⁽⁴⁾ Each spouse has absolute ownership in his or her property which, according to Hayley, is a corollary to easy and frequent divorce.⁽⁵⁾ Property acquired by the wife in any way before or after the marriage belongs to her absolutely. When property is acquired jointly by the husband and wife it belongs to them jointly.⁽⁶⁾ Dowry plays an important part in the law of property.⁽⁷⁾ In the *dīga* marriages the bride

(1) For discussion see *infra*.

(2) For comparison between the two see Dr. J. D. M. Derrett : The origins of the laws of the Kandyans, University of Ceylon Review vo. XIV pp. 105-150.

(3) F. A. Hayley : A treatise on the laws and customs of the Sinhalese including the portions still surviving under the name Kandyan law pp. 194-95.

(4) Hayley p. 195.

(5) *Ibid* p. 285. But this reason is not true; for, in many of the aboriginal tribes divorce is free and/or frequent but the wife either does not possess any property or her property, at least during coverture, is completely controlled by her husband who treats his wife herself as his property. - See *infra*.

(6) *Ibid*.

(7) *Ibid* pp. 331, and at 334-35 wherein the author traces the analogy between the Kandyan law and the *Thesawalamai*.

usually takes very large sum from her parent's house to the bridegroom's house.⁽¹⁾ However, in case of divorce the wife takes her dowry and her separate property as well as her share in the joint property of husband and wife.⁽²⁾

The importance of dowry in the law of succession can easily be understood if it is remembered that the family of a diga-married daughter is something very similar to an ordinary Hindu family whereas the position of a binna-married daughter is nearer to a marumakkattayi female who remains in her own family which again may be a binna-married daughter's father's or mother's house.⁽³⁾ The effect of dowry may be seen from the fact that succession to immoveable separate property of a male devolves together upon his widow, sons, and unmarried and binna-married daughters but his diga-married daughters are entitled to succeed only in default of these heirs or their issue.⁽⁴⁾ There are conflicting tables about the line of heirs who are entitled to succeed to such property in default of the issue of the deceased⁽⁵⁾ but on the whole the line of heirs bears a considerable resemblance with the line given in Hindu law. As regards succession to father's property the position of a diga-married daughter is very much similar to that of a daughter in Hindu law who is entitled to get only marriage-expenses out of her father's property in the presence of his sons.

The immoveable property of a diga-married daughter devolves

(1) Ibid p.333.

(2) Ibid p.287.

(3) See Marumakkattayi law supra.

(4) Hayley pp.351, 369-70.

(5) See ibid pp.430-32. Succession to moveable property of females not much different - see ibid p.452.

equally upon her issue, male or female, single or married, living in digā or binna, legitimate or illegitimate.⁽¹⁾ Thus the mother's inheritance is equitably distributed.⁽²⁾ The husband has no right in his wife's inherited property if any of her nearest blood-relations survive her. However, in the absence of children, he takes the property acquired by her during married life.⁽³⁾ In the case of a daughter married in binna on her father's property, her paternal inheritance devolves in accordance with the rules laid down for succession to male's immoveable property whereas the rest of her property devolves equally on all her children in the above-mentioned manner.⁽⁴⁾ In the case of a daughter who is married in binna on her mother's estate and having her daughters also married in binna on her estate, her property devolves on her daughters to the exclusion of her sons, if her husband has sufficient property to go to her sons.⁽⁵⁾ This is quite in accordance with the general principle of the Kandyan law that if a descendant has been unduly benefited from the father's estate by gift, bequest, or inheritance he will lose pro tanto his share in mother's property.⁽⁶⁾ The Niti Nighanduwa mentions a hereditary series of binna marriages on mother's premises whereby mother's property is being continuously passed on to the female heirs in the female line with a descent 'similar to that of the maternal

(1) Ibid at p.462.

(2) Ibid p.463.

(3) Ibid p.463.

(4) Ibid p.467.

(5) Ibid p.468. This provision is very similar to the provision of Bandhāyana referred to supra pp 312-3 and resembles the matrilineal succession in general of the Marumakkattayam law.

(6) Hayley p.468.

muthusom of the Mukkuwas'.⁽¹⁾ This is essentially the characteristic of strīdhana as expounded in the very old śāstric law of Baudhāyana and Gautama.⁽²⁾ The husband of a binna-married daughter has no right in her immoveable property.⁽³⁾ The other heirs inherit female's immoveable property in the same way and order in which they inherit male's immoveable property.⁽⁴⁾

The moveable property of a female devolves firstly upon her children in like manner as her immoveable property. In their default the husband takes property acquired by her, in preference to all her own relations and her property acquired by her before marriage in preference to her remote relations like uncles, aunts etc. Property obtained by dowry, gift or inheritance from parents or brother goes to them respectively. But brothers cannot claim the dowry given to a diga-married daughter by her parents; it goes to the husband. But they do take such dowry given to a binna-married daughter.⁽⁵⁾

It is interesting to note that the proprietary rights of the husband of a binna-married daughter in her family are not the same as those of a khana-damad known to the Punjab customary law or a gharjawai known to many other aboriginal communities in India although the social position of all these is the same.⁽⁶⁾ Such husband in Kandyan law goes as a stranger and remains a stranger throughout his life. The favour shown to illegitimate children is strikingly

(1) Niti Nighanduwa 109 cited in Hayley p.464.

(2) See supra. But for a difference between the two see infra.

(3) Hayley pp.461-62.

(4) Ibid p.472.

(5) Ibid p.474.

(6) For khana-damad see supra p.599 , for ghar-jawai see infra p.632.

important since they inherit not only their mother's property but also their putative father's property excepting his paraveni i.e. estate of inheritance.⁽¹⁾ One more thing to be noted is that prostitution is banned and there exists a very severe punishment for the offenders.⁽²⁾ Perhaps free and frequent divorce leaves very little room for prostitution; consequently there are no separate rules for succession to prostitute's property as they exist under some other systems of law.

The provision about a diga-married daughter being initially excluded from paternal inheritance reminds us of the provision of Yājñavalkya whereby in partition amongst the sons during the life-time of the father the mother does not get a share or gets a pro tanto reduction in her share if she has already received some strīdhana from her husband or father-in-law.⁽³⁾ It is to be noted that such dowry is like strīdhana and is in fact called strīdhanam or varaśulka amongst the Malabar brahmins.⁽⁴⁾ The provision about succession to dowry and other moveables obtained from the parents' family reminds us of the provisions of Yājñavalkya, Kātyāyana and Vṛiddha Kātyāyana according to whom the strīdhana given to a female by her bandhus goes to bandhus in default of her children.⁽⁵⁾ ^{however,} Dr. Derrett, remarks that the law of succession to female's property bears a strong resemblance to

(1) Hayley pp.390-91.

(2) Ibid p.122.

(3) Yaj.2.115.

(4) See supra. Strīdhana included in the kinds of impartible property really meant varaśulka or dowry given by the bride's parents to the bridegroom - supra.

(5) Yaj.2.144; Kātyāyana : "Bandhudattam tu bandhūnām...etc"; Vṛiddha Kātyāyana : "Pitṛibhyam cha^{iva} yaddattam ...etc" - supra.

the developed rather than to the primitive rules of descent to strīdhana and that "that development itself must be attributed to the growing predominance in some parts of India of the surviving traces of pre-Āryan female independence and the necessity for keeping dowry and the acquired property of the females out of the hands of the husband's collaterals."⁽¹⁾

The rest of the material available on the customary laws of India may be said to be represented by individual works of authors who tried to ascertain and state directly or incidentally the customary law of a particular country, community or locality. The material collected by such authors may be divided into three categories, namely, legal, ethnographical and anthropological out of which the first category, which is most useful for our purpose, does not appear to have attracted enough scholarly attention.

The earliest attempt to collect material on customs from a legal and not merely from a sociological point of view appears to have been done by Steele, who in 1826 published a digest-type book entitled 'The Law and Custom of Hindu Castes.' The information given in this book is based mainly upon the official inquiries conducted district by district by the government officers in parts of Maharashtra including Poona, Satara and Khandesh. The inquiries which elicited replies from the śāstris as well as from the leading representatives of the different castes⁽²⁾ were conducted with three objectives, namely, to ascertain the particular text-books and

(1) The origins of the laws of the Kandyans opp.ct.p.132.

(2) Steele (1808) Preface pp.viii, xiv-xvi.

commentaries referred to as authorities by the śāstris; to investigate the number and the relation of the existing castes and their mode of preserving old or establishing new custom; and to compare the written law with the unwritten customs, "and note their conformity with or opposition to each other."⁽¹⁾ The book which contains material referring to customary law of nearly 150 castes or more could have hardly done full justice to the stupendous task which its author undertook; nevertheless, the book reveals many customs, some of which show the existence of the rules of the śāstra which are otherwise taken to have become archaic and obsolete; at the same time some of the customs appear to have continued in existence either in disregard for, or in ignorance of, the śāstra, or to have been newly introduced in defiance of the śāstric provisions.

Customs of the former kind exist with regard to divorce and remarriage, which were allowed by the now obsolete rules of the śāstra.⁽²⁾ For instance amongst the lower castes widows are entitled to contract a second marriage called pāt. In a majority of the lower castes the wife can leave the husband and contract pāt if her first husband is impotent; if the two spouses continuously quarrel; if there is mutual consent of the two; or if the husband becomes an outcaste.⁽³⁾ Similarly, as in the olden days before the age of commentators, the father has a right ad libitum to disqualify a son

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- (1) Ibid Preface pp.vi-vii. For a very meagre statement about the general conformity and disagreement between the law and customs see Steele Preface p.xvii.
- (2) For a succinct statement about the development of the Śāstra see supra.
- (3) Steele pp.159, 168-69, 369. For difference between the first marriage and pāt see ibid. pp.364-66.

from having a share in partition on account of the latter's ill-conduct such as a tendency to quarrel. The son usually is not entitled to claim partition during the life-time of the father and has to be pleased with whatever the father gives him.⁽¹⁾

The whole customary law about the property of women includes the latter kind of customs which seem to have remained current despite the precepts of the śāstra or have been introduced at a later stage when the invading Aryans came into deeper contact with the indigenous aboriginals so as to form a mixed society.⁽²⁾ Amongst the majority of the castes, all the property of a wife is regarded as being her husband's property and she has to consult him in making a gift etc. of such property. The husband's control usually exists whether the wife stays with him, with her parents or separate from them both. Naturally after the death of the wife the husband is the first preferential heir. The succession then devolves upon children; brother-in-law and nephews; parents; brothers and sisters. Presents given by the husband go, in default of the children, to the mother-in-law.⁽³⁾ Thus it is clear that the customary law of the Deccan is very similar to the Punjab customary law in giving supreme authority

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- (1) Steele pp.213, 405-8. According to Yaj.II 114, Yaj.II 116, Na.Smr.16.4 i.e. Na.Sam.14.4, Na.Smr.16.15 i.e. Na.Sam.14.15, it is obvious that the father had a supreme authority in partitioning family property though the commentators try to direct these texts to the father's self-acquired property. See, however, Brihaspati quoted in Vya.Pra.439 prohibiting a father from disqualifying without reason a son from having a share in partition. This seems to have been a later development of the law.
- (2) For the law amongst the aborigines see *infra*. For vrātyśṭoma or ceremony of converting non-Aryans into Aryans see *infra* p.547.
- (3) Steele pp.236-37; 366-67. For possession of jewels of the wife during the solemnisation of the marriage and maturity of the wife see *ibid* pp.359-60.

and importance to the husband as regards the wife's property; at the same time it differs from the latter in as much as the former accepts a married woman's blood-relations as heirs to her own property.⁽¹⁾

The second attempt seems to have begun as early as in 1827 in which year the Bombay Sadar Divani Adalat issued a circular and deputed Borrodaile to collect information about the customs of castes in Gujrat.⁽²⁾ The circular was issued in pursuance of the Bombay Regulation IV of 1927 which obliged the Courts to take into consideration, and to give a decision in accordance with, the custom of the parties.⁽³⁾ It seems that soon after this deputation Mr. Borradaile started his work and collected information about the customs of 257 castes in Surat and of 56 castes in Broach.⁽⁴⁾ He had prepared a questionnaire which was presented to the leading representatives of each community and he recorded their answers given in detail.⁽⁵⁾ The questions, which were based mainly on inheritance, succession and special property of females, have brought out interesting information with such enormous details that one wonders why the results of the inquiry remained unpublished till as late as 1884. However, it is not surprising to find that Borradaile's efforts are almost unknown to modern scholars since they could hardly have been referred to by the Divani Adalats of Bombay; when they eventually came in a published form before the High Court the law had probably already grown

(1) Supra pp. 599-600 for the Punjab Customary law.

(2) See the circular reprinted in Rao Bahadur Nana Moroji: Borradaile's Gujrat Caste Rules p.1.

(3) Supra p. 506.

(4) Gujrat Caste Rules p.2.

(5) Ibid. p.3. For the three lists of questionnaire see ibid. pp. 5, 13, 22.

too rigid easily to acquire a new pattern.

The information reveals one important fact, namely, that each and every community in Gujrat has some custom or another which is in direct contravention of the śāstra. It appears that it is only the Brāhmaṇa^{amodha} Chāturvedī Suratī caste which is almost uniformly governed by the śāstric law.⁽¹⁾ Amongst the customs of the other castes the deviations from the śāstric rules display such a bewildering diversity that one easily agrees with Nelson who writes: "But, for obvious reasons, I would vastly prefer a collection of usages and customs to a code of Sanskrit law."⁽²⁾ The information most important for our purpose is the one about palla which means money given by the bridegroom or his party to the bride on the occasion of her marriage and for her separate use.⁽³⁾ The sum to be paid as palla is fixed at different amounts in different communities and the rules about its possession, control and succession vary widely in different communities. If one admits that money offered as a bride-price by the bridegroom to the bride's parents and presents given as varaśulka or varadakṣiṇā by the bride's parents to the bridegroom in the Āsura and Brāhma marriages respectively were gradually transformed into the earliest categories of strīdhana,⁽⁴⁾ one would easily realise that the diversity in the customs about palla represent the different phases of this transformation.⁽⁵⁾ It is no wonder, therefore, that

(1) Ibid. pp.871- 22- the usual answer given to all questions is 'Je śāstramañ cñhe teja pramāṇa cñhe'.

(2) J.H.Nelson: Indian Usage and Judge-made law in Madras (1889) pp.20-21.

(3) Ibid.p.3; Palla is also spelled sometimes as pulla but really it ought to be 'palluñ' as it is in Gujarati.

(4) For this see *supra* pp. 41, 56, 64, 86-88, 310-12, *infra* pp. 630-31.

(5) For an unsuccessful attempt of the defendant to distinguish between palla and the bride-price see *Jotiram v. Bai Diwali A.I.R*

the earliest reported cases about strīdhana ^{from Bombay} had palla as their subject-matter. (1)

The other two important attempts to ascertain customary material from a legal point of view have been made by Mr. Pannalal and Dr. Joshi, who focus their attention on the customary law of the Khasa tribes residing in the Kumaon hills. But the information furnished by their works will be considered later on together with the anthropological material which deals with the customary law of the other aboriginal tribes of India.

By the close of the last century the government of India proposed to make an official ethnographic survey of India which eventually resulted in publication of several provincial surveys of the different castes and tribes. The survey was headed by Risley who was the first to publish his own survey under the name "The tribes and castes of Bengal". (2) This was soon followed by information about the other tracts which was published by eminent authors like Thurston, Ananthakrishna Iyer, Russell etc. (3) However, this ethnographical survey was conducted mainly to note the religious and the cultural

1939 Bom.154 supra; he would have been much benefited if he had resorted to the information collected by Borradaile.

(1) See supra pp. 263-65.

(2) H.M. Risley: The Tribes and Castes of Bengal (1891).

(3) W. Crooke: The Tribes and Castes of the North Western Province and Oudh (1896); E. Thurston: Castes and Tribes of Southern India; Ananthakrishna Iyer: The Cochin Tribes and Castes; R.V. Russell: The Tribes and Castes of the Central Provinces of India (1916); Syed Siraj Ul Hassan: The Castes and Tribes of H.E.H. the Nizam's Dominions (1920); R.E. Enthoven: The Tribes and Castes of Bombay (1920-22); H.A. Rose: A Glossary of the Tribes and Castes of the Punjab and North-West Frontier province; Ananthakrishna Iyer: The Mysore Tribes and Castes (1935); Krishna Iyer: The Travancore Tribes and Castes (1937-41).

side of the castes and tribes and not to enunciate the law of property as current in each caste and tribe. Risley himself thought that minute details of inheritance had no bearing on the subject and that it was enough to note whether a tribe followed Islamic law or followed pagband or chunaband rule etc.⁽¹⁾ But these works are important from the point of ascertaining the social customs which have an indirect bearing upon the development of the law of property and furnish vast and reliable material on this subject.⁽²⁾

Anthropological research in India is having to its credit a considerable number of publications about the aboriginals of India and these are fast growing in number as well as information and importance. Such works incidentally deal also with the proprietary law of the aborigines. The importance of the customary laws of the hundreds of the aboriginal tribes cannot be overestimated since they represent quite a considerable part of the population of India: the Gonds and the Santals alone are about three millions each; the Bhils have a population of about two and a half millions and the Bhuiyas of Orissa form a number of above one and a half million

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- (1) The Tribes and Castes of Bengal, Ethnographical Glossary Vol.II p.181. But the volumes published by Ananthakrishana Iyer and his equally illustrious son Krishna Iyer do contain notes on rules of inheritance amongst almost each and every caste and tribe mentioned therein. The same is the case with Syed Ul Hassan's publications which occasionally give notes on rules of inheritance.
- (2) For instance, for prostitution see the Mysore Tribes and Castes Vol.I pp.214-222; for female infanticide see Thurston's Ethnographic Notes in Southern India pp.502-509 and Rose Vol.I p.635; for exclusion from inheritance see the Mysore Tribes and Castes Vol.III p.428. For the only two cases in which Thurston was and was not relied upon respectively in determining customary rules about inheritance see *infra* p. 563.

Indian citizens.⁽¹⁾

Most of these aborigins have a similar frame of the law of property so far as the proprietary capacity of women is concerned. As in the case of the customs incorporated in Steele's treatise the customs prevalent amongst the aboriginals sometimes represent the existence of archaic provisions of the śāstra and sometimes they are even much more primitive, so as to justify some of the earliest prohibitions in the śāstra.

The rules amongst the aborigins may be stated to be generally as follows:-

For obtaining a girl in marriage the bridegroom or his family usually has to pay a bride-price to the parents or brother of the bride. It is no wonder, therefore, that this kind of form of marriage was termed in the śāstra as 'Āsura' since the invading Aryans used to designate the indigenous aborigines as asuras or dasyus. Moreover the bride-price shows an early stage of the śulka in as much as it becomes the property not of the bride but of the bride's parents or brothers.⁽²⁾ It is no wonder, therefore, that Manu and other śāstric authors carry on a big tirade against such 'sale' of daughters.⁽³⁾ As a result of this conflict between the

(1) Indrajit Singh: The Gondawana and the Gonds (1944) p.1; P.C. Biswas: Santals of the Santal Parganas (1956)p.2; Nabendu Datta Majumdar: The Santals, a Study in Culture-change (1956)p.32; T.B.Naik: The Bhils p.3; Sarat Chandra Roy: The Hill Bhuiyas of Orissa (1935)p.41.

(2) For bride-price see Santals of the Santal Paraganas p.156; W.V.Grigson: The Maria Gonds of Bastar (1938)p.295; The Santals p.84; W.H.R.Rivers: The Todas (1906)p.522; Tarakchandra Das: The Wild Kharias of Dhalbhum, University of Calcutta Anthropological Papers No.3 p.25; The Hill Bhuiyas p.177; Sarat Chandra Roy: The Kharias (1937) p.299 etc.

(3) See supra.

existing custom and the incoming śāstra it would seem that this bride-price got transformed in śulka so as to form one of the categories of strīdhana. It retains, however, the traces of its origin by having a special line of succession consisting of the blood-relations of the female. Unlike the case of the Aryans there are no child-marriages and a girl usually marries after puberty.⁽¹⁾ Women move freely in society and work along with men. Divorce and re-marriage are quite free and frequent, and they are resorted to without any tinge of social odium or censure.⁽²⁾ Amongst the Santals such divorce is usually the result of adultery for which the husband may, at his option, claim compensation from the adulteror.⁽³⁾ Widow-remarriage also is neither disfavoured nor rare.⁽⁴⁾ It is quite a unique feature of these tribes that polyandry, in whatever quarters it exists, takes the shape of a fraternal polyandry which is worked out in a thoroughly agnatic and patriarchial type of family.⁽⁵⁾ It might probably be the result of the lesser number of females in a particular tribe or more probably the result of poverty in which case the members of a particular family may think it worthwhile to spend ^{once} only the amount required as bride-price⁽⁶⁾ which can become 'a severe tax'⁽⁷⁾ upon the family economy.

(1) The Gondawana and the Gonds p.90; The Kharisa p.225 etc.

(2) The Santals p.85; L.D.Joshi: The Khasa Family Law pp.2,150-67 etc

(3) The Santals p.85; See also Steele pp. according to which it appears that amongst a great number of lower castes the adulteror has to pay compensation to the husband of the adulteress.

(4) The Gondawana and the Gonds p.94; The Hill Bhuiyas p.175; The Khasa Family Law p.2 etc.

(5) The Todas p.515; The Khasa Family Law p.77 etc.

(6) For reasons of polyandry see supra pp.

(7) The Maria Gonds of Bastar p.295.

With post-puberty marriages and frequent and free divorce one may expect that women might have greater proprietary rights amongst the aborigines than amongst the caste-Hindus.⁽¹⁾ But the case is exactly otherwise. They usually do not have any kind of property moveable or immoveable. On the other hand a woman herself is considered as a piece of property - and a valuable one - of the husband.⁽²⁾ Amongst the Khasa she is merely considered as a chattel; amongst the Purdhans a wife is called 'mal' which means property.⁽³⁾ In succession to a male's property the widow and the daughter have no right of inheritance at all. The widow usually gets only maintenance and in some cases she does not get even that much. Amongst the Santals the widow can get mere possession of her deceased husband's property and that too only if her sons are minors. It should also be noted that whereas daughters are unanimously excluded from inheritance the ghar-jawai or a son-in-law who stays with his sonless father-in-law is accepted as an heir.⁽⁴⁾ His position, therefore, is very similar to a khana-damad in the Punjab customary law and the reasons for his importance must also be the same.

We already conjectured that several customs amongst the aborigines either correspond to, and thus may be supposed to represent

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- (1) See, for instance, Hayley's reasoning *supra* p. 618.
 - (2) The Maria Gonds p.295; The Khasa Family Law pp.111-116; Shamrao Hivale: The Purdhans of the Upper Narbada Valley (1946)p.149 etc.
 - (3) See *ibid*.
 - (4) For rules of succession see Santals of the Santal Purganas pp.155-56; The Maria Gonds pp.293-95; The Santals p.84; The Todas p.563; The Bhuiyas pp.176-77; The Kharias pp.168-72; The Khasa Family Law p.3; The Bhils pp.67-68; P.C.Biswas: Primitive Religion, Social Organisation, Law and Government amongst the Santals, University of Calcutta Anthropological Papers, New Series no.4 (1935)pp.82-84.

prototypes of, the rules of the Śāstra which we know to be archaic, or are just the things which the progressive Śāstra wanted to prohibit altogether.

The instances of the first kind are as follows:-

(I) Women are usually excluded from inheritance. This reminds us of the archaic provision of Baudhayana to the effect that women are incapable of having a share in inheritance.⁽¹⁾

(II) As an instructive parallel from another branch of law we find that amongst the Bhils and Bhuiyas the eldest son takes a larger share and amongst the Bhils all the sons take shares in order of their seniority.⁽²⁾ This reminds us that the eldest son used to get the lion's share according to the smṛitis but that by the time of the commentators these texts were treated as obsolete on account of their being opposed to the existing public opinion amongst the caste Hindus.⁽³⁾

(III) Again amongst the Khasas the second husband of a woman has to pay the debts of the first husband⁽⁴⁾ which reminds us of the provisions of Yājñavalkya, Nārada etc. to the effect that a person who takes by inheritance the property or women of some other person must pay the debts of the latter.⁽⁵⁾ The explanation given by

(1) See supra p.50.

(2) The Bhils p.67; The Bhuiyas p.176.

(3) See Manu 9.112, 9.117; Yaj.2.114; Na.Smr.16.13-14 i.e. Na.Sam.14.13-14; Brihaspati quoted in Vya.Pra.446-47 etc. But see Mit.on Yaj.2.117 which declares such texts obsolete.

(4) The Khasa Law p.114.

(5) Yaj.2.51; Na.Smr.4.21 i.e. Na.Sam.2.18; Na.Smr.4.22 i.e. Na.Sam.2.19; Na.Smr.4.23 i.e. Na.Sam.2.20.

the commentators that the word 'woman' denotes wife of the deceased⁽¹⁾ is strengthened when one sees that the rule is still applicable to the wives of the Khasas who apparently remained aloof from the fast progressing trend of the Hindu Dharmaśāstras.

(IV) Amongst the Khasas in Tehri state the sonless man's property, widow and unmarried daughters till recently were escheat to the King⁽²⁾ which reminds us of the old provision of the smṛitis whereby the king has to take possession of the property of a deceased sonless person while providing only maintenance for his widow.⁽³⁾ It also reminds us of the verse of Bṛāhadāraṇyaka which declares that in the absence of support of either of the two families of a woman the king becomes her lord and protector.⁽⁴⁾

Some of the current customs account also for the leading prohibitions of the śāstra:-

(I) The institution of polyandry well accounts for the statements in the Mahābhārata in which the sages Dīrghatamas and Śvetaketu are shown to have introduced a new rule that women ought to be monogamous.⁽⁵⁾ The notorious instance of fraternal polyandry amongst the Pāṇḍavas who had their wife Draupadī in common ceased to be

(1) See for instance the comments of Viśvarūpa, Vijñāneśvara and Aparārka on Yaj.2.51; Asahāya commenting on the above verses of Nārada gives an explanation which tallies exactly with the custom amongst the Khasas. However, the later tendency of the Dharmaśāstra was to forbid remarriage of widows so that the contingency mentioned in the above smṛities could never have arisen.

(2) The Khasa Family Law p.112, 278-79.

(3) Na.Smr.16.52 i.e.Na.Sam.14.49. But see Mit.on Yaj.2.136, for instance, wherein like all other succeeding commentators Vijñāneśvara refuses to include wife of the deceased in the 'strī' mentioned in this text.

(4) Na. Smr. 14.27-29 & Dharmak. 555.

(5) Ma.Bha.1.104.34-37 and 1.122.8-21; see also supra

imitated at least amongst the Aryans. Thus where the Śāstra could not remould the aborigines of the country it at least insulated the people whom it professed to govern against such aboriginal customs. (1)

(II) Amongst the Khasas the husband acquires a disposable property in his wife by paying a bride-price in marriage and he can make a gift of her to the brahmins. (2) This reminds us of the position taken by the Śāstra which admits that a man has property in his wife and sons but takes care specifically to exclude them from the list of 'deyas' or things capable of being given. (3)

(III) Amongst the same people when a fraternal polyandrous family breaks up by partition even the wives are included in the property to be partitioned; (4) so we come to know why women are specifically excluded by Manu and others from property which is capable of being partitioned. (5)

Keeping these various facets of the śāstric and customary laws in mind we now turn to the new enactments passed by the Indian Parliament which have brought about a dynamic change in some aspects of Hindu law. The customary material which we have seen would help us to appreciate this change from different angles, and would help us to know whether this change is leaning towards either or both of

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- (1) For Kumārila's argument in defence of Draupadī's instance see Jha: Pūrva-Mīmāṃsā in its sources Vol.I pp.225-33; See also Kapadia pp.106-10.
- (2) The Khasa Family Law p.113.
- (3) For a discussion see supra pp.248-56. For the old position of the Śāstra see Tai.Āraṇyaka 7.11.3: "Strīṇām dānavikrayātisargā vidyante na pūṃsah". But see Yaj.II.175; Na.Smr.7.4-5 i.e.Na. Sam.5.4-5; Bṛihaspati quoted in Apa.on Yaj.II 175 etc.; Dakṣa quoted in Vi.Ta.600 etc. for the list of 'adeyas' or things which should not be given away.
- (4) The Khasa Family Law p.80. For the Śāstra see supra pp.
- (5) See Gautama 28.48: "Strīṣu cha saṃyuktāsu" which seems particularly to refer to such common wives. See also Vi.Smr.18.44; Manu 9.219; Uśanas quoted in Mit.on Yaj.2.119 etc.

the śāstric and the customary laws or towards some third system. Both śāstra and (in cases, for the present, other than those of the Scheduled Tribes) the customary laws have given place, in India, to a new scheme which, as it replaces both the former systems (or rather group of systems), may be accounted for and criticised from two essentially distinct standpoints.

CHAPTER VI.

After having the ^{śā}stric, judicial and the customary law concerning strīdhana we have now to turn to the recent Indian enactments which have brought about a metamorphosis in the old ^{śā}stric and judicial law concerning strīdhana. Before turning to these recent enactments it is worth noting that legislative measures affecting proprietary rights and particularly succession under ^{the} ordinary Hindu law in British India began as early as in 1850 A.D. when the Caste Disabilities Removal Act XXI of 1850 was passed. This enactment was followed by several central and provincial enactments like Oudh Estates Act I of 1869, Hindu Wills Act XXI of 1870, Special Marriage Act III of 1872, Bombay Hereditary Offices Act II of 1874 etc. till the Hindu Women's Right to Property Act XVIII of 1937 went to the extent of affecting the devolution even of a coparcenary interest in a joint Hindu family.(1) But such piecemeal legislation did not in fact overhaul Hindu Law which continued

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(1) See also Hindu Transfers and Bequests Act Madras Act I of 1914; Hindu Disposition of Property Act XV of 1916; Hindu Transfers and Bequests (City of Madras) Act VIII of 1921; Hindu Inheritance (Removal of Disabilities) Act XII of 1928; Hindu Law of Inheritance (Amendment) Act II of 1929; Hindu Gains of Learning Act XXX of 1930; Hindu Women's Rights to Property Act XVIII of 1937 etc. But see the Bibliography of the Hindu Succession Bill p. 1 (published by the Government of India) which mentions that the Hindu Transfers and Bequests Act Madras Act I of 1914 was the first legislative measure affecting succession under ^{the} old Hindu law and that it was followed consecutively by the six enactments mentioned just above.

to be ascertained only with the help of the Śāstra and judicial decisions. However, the expediency of having a ^{codification} consolidatory of Hindu law was being continuously felt by the central legislature of British India since 1939.(1)

During the years 1941 to 1948 several private bills concerning enlargement of women's proprietary rights came before the central legislature.(2) As an effect of this prolonged process the Indian Parliament has recently passed four enactments which consolidate the law governing marriage, guardianship, maintenance, adoption and succession.(3)

Before ^{noting} the changes brought about by these recent enactments it would be worthwhile to note that such attempts had already been made in the states of Mysore and Baroda, which had gone far ahead of British India in attempting to have a consolidatory codification of Hindu law.

Between the enactments of the Mysore and the Baroda states the Mysore enactment called the Hindu Law Women's Rights Regulation X of 1933, being the first of its kind, deserves special notice. The enactment is outstanding in as much as it

(1) Bibliography of the Hindu Succession Bill p.1.

(2) See *ibid.* pp. 4-5.

(3) See The Hindu Marriage Act 25 of 1955, Hindu Succession Act 30 of 1956; Hindu Minority and Guardianship Act of 1956; Hindu Adoption and Maintenance Act 72 of 1956.

not only anticipated so early as in 1933 almost all the reforms introduced by recent central codification but contains provisions which, in some respects, are even better than those contained in the recent codification. The main objects of the bill which came before the Mysore legislature were: to eliminate those provisions of Hindu law which disqualify an heir on account of any physical defect, deformity etc.; to establish equality between men and women as regard proprietary rights; to destroy the unquestionable priority of agnates in succession under the ordinary Hindu law and to destroy the discrimination between the illegitimates of the Śūdra and the other classes. (1)

According to this enactment, which applies only to persons of the Mitākṣarā school (2), at a partition between a person and his sons, his mother, unmarried daughter, and widow ^{as well as} ~~and~~ unmarried daughter of a predeceased son or brother are entitled to have a share. At a partition amongst brothers, their mother, unmarried sisters, widows and unmarried daughters of predeceased sonless brothers have a right to take

(1) Sec. VI Mys. L. J. 53 for K.T. Bhasyam Aiyangar's speech moving the resolution for the consideration of his Hindu Law inheritance Bill. The question how far ^{some of} these objects are desirable or in conformity with the spirit of the Śāstra or the present society will be considered later on in the conclusion. But here see S.N. Naraharayya : Hindu Law of Inheritance Bill, VI Mys. L. J. 35 for a very strong and orthodox attack against the objects of the Mysore enactment.

(2) Hindu Law Woman's Rights Regulation X of 1933 Sec. 2(i).

a share.(1) The widow takes one-half of the share which her husband would have taken if he were alive; the mother takes one-half of the son's share if he is alive or one-half of the share which her husband would have had if he were alive; a daughter or a sister takes one-fourth of her brother's share if ^{he} is alive or one-fourth of the share which her father would have taken if he were alive.(2) The share of an unmarried sister or a daughter is inclusive of, and not in addition to, the expenses for her marriage.

It is thus evident that the roots of the Mitākṣarā joint family system received a blow in Mysore which was much earlier and much more severe than the one it received by the Hindu Women's Rights to Property Act of 1937 in British India. In the first place, unlike the second enactment, even the unmarried sisters and daughters receive a share in joint family property and in the second place, such property, as we shall presently see, becomes strīdhana of the females concerned. There can be no doubt that this arrangement does not establish complete equality between the two sexes as far as their shares are concerned but one cannot lose sight of the fact that normally

(1) Ibid s. 18(i).

(2) ibid s. 18(2).

at a partition under this enactment, three generations of females would partake against only two generations of males.

Succession to the property of a male Hindu dying intestate devolves successively upon his (1) male issue to the third generation, (2) widow, (3) daughter, (4) daughter's son, (5) mother, (6) father, (7) widow of predeceased son; (8) son's daughter, (9) daughter's daughter, (10) brother of full blood; (11) brother of half-blood; (12) son's son's daughter, son's daughter's son's son, daughter's son's daughter, daughter's daughter's son and daughter's son, son's daughter's daughter, daughter's daughter's daughter; (13) widow of predeceased grandsons and great-grandsons. In default of all these heirs which constitute the 'family' of the propositus his estate devolves upon the 'family' of his father and the heirs standing in same relation to the father as to the propositus mentioned above succeed amongst themselves in almost the same successive order. In default of these the estate devolves successively upon the family of the father's father, father's father's father and upon the families of the maternal ancestors of the propositus in the same order.(1).

Thus it will be seen that preference to the agnates is not thoroughly destroyed in this enactment since, for instance,

(1) Ibid s. 4. See also Dr. J.D.M. Derrett: Hindu Law Past and Present pp. 229-30.

the male issue in the male line is preferred to the descendants who are cognates, or since succession devolves in default of the family of the propositus upon the families of the paternal male ancestors in preference to those of the maternal ancestors. Even son's daughter is preferred to daughter's daughter.(1) Similarly equality between the two sexes is also not fully established since son's daughter and daughter's daughter who are equally removed from the propositus as his son's son, come much below the latter in the order of succession.

The outstanding feature of this line of succession is that it includes many female heirs, whether cognates, agnates or widows of pre-deceased agnates, who were utterly unknown to the line of succession under the old Hindu law. The Act, however, keeps some relationship with the old Hindu law by retaining intact, with few exceptions, the compact series of heirs in which many heirs like widow, daughter, mother etc. take successively and not simultaneously as under the Hindu Succession Act of 1956.

The most important provision of the Act is contained in s. 10 of the Act which pertains to stridhana and runs as follows:-

(1) But all the direct descendants of the propositus related to him in the fourth degree, whether agnates or cognates, male or female, succeed to him simultaneously and equally - See *ibid* s. 4(1) XII.

" S. 10 (1) "Stridhana" means property of every description belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate.

(2) Stridhana includes:-

- (a) all ornaments and apparel belonging to a female;
- (b) all gifts received by a female at any time
(whether before, at or after her marriage) and
from any person (whether her husband, or other
relative or a stranger);
- (c) property acquired by a female by her own exertion,
skill, learning or talents;
- (d) property acquired by a female by purchase,
agreement, compromise, finding or adverse
possession;
- (e) the income, and savings from income, of all
property whatsoever ~~x~~ vested in a female,
whether absolutely or otherwise;
- (f) property obtained by a female as her share at a
partition; and
- (g) property taken by inheritance by a female from
another female and property taken by inheritance
by a female from her husband or son or from a male
relative connected by blood except when there is
a daughter or daughter's son of the propositus

alive at the time the property is so inherited.

(3) All gifts and payments other than and in addition to or in excess of, the customary presents of vessels, apparel and other articles of personal use made to the bride or bridegroom in connection with their marriage or to their parents or guardians or other persons on their behalf, by the bridegroom, bride, or their relatives or friends, shall be the stridhana of the bride. "

It will thus be seen that the Mysore enactment has almost totally accepted the etymological definition of strīdhana as given by Vijñāneśvara and his followers. Subsection (9) of S. 10, however, puts a small limitation on the etymological meaning of the word strīdhana. According to this subsection property inherited by the widow or daughter of the propositus would not be her absolute property if a daughter or a daughter's son in the former case, and ^adaughter's son in the latter case are alive. But in the absence of these reversionary heirs the widow or daughter, as the case may be, would take an absolute interest in the inheritance. The widows of the male agnates of the propositus can, however, never take absolute estate in the inheritance. In all other cases property inherited by females would be ~~their~~ strīdhana. Thus in this respect the post-enactment position in Mysore is very similar to the position of the ordinary Hindu law of the Bombay School.

The question about woman's right of disposing of her property is completely set at rest by the provision that woman shall have absolute power of disposing of her strīdhana except during minority during which alone her husband can exercise some control as a guardian.

Succession to strīdhana devolves first upon the children, male or female, of the propositus and then upon grandchildren, male or female. However, property mentioned in S. 10 (a) & (b) above i.e. property which may roughly be called as the technical strīdhana of a woman devolves upon the daughter, daughter's daughter, daughter's son, son, son's son and son's daughter the last two heirs taking together. (2). Thus equality amongst the two sexes is introduced so far as succession to non-technical strīdhana is concerned but the old Mitākṣarā line is adhered to as regards succession to technical strīdhana. The advantages retained, in some cases, by males in succession to males are, in this manner, counterbalanced by the advantages retained by females in succession to females.

(1) Hindu Women's Rights Regulation S.11.

(2) Ibid s. 12 (I).

In default of the above-mentioned children and grandchildren of the female propositus succession devolves upon her husband, her husband's heirs, uterine brothers and sisters, mother, father, father's heirs, and mother's heirs.(1) It is thus clear that at least as regards succession to the stridhana of a childless married woman all distinction based upon the source of her property or the form of her marriage etc. are thoroughly wiped out. In view of the large body of persons who could be husband's heirs it is evident that the mother or father of a woman can rarely hope to inherit her stridhana whereas she herself is one of the nearest heirs to them. It is also to be noted that the position of a great-grandson who has been totally neglected under old Hindu law of the Mitākṣarā School is none better under the Mysore enactment: he succeeds along with the step-children of the woman and only as an husband's heir.

Another notable feature of the line succession is that 'children' of a woman include her legitimate as well as illegitimate children (2) which means that the enactment accepted the rule laid down in ^aMyna Bace's case and also closed the controversy on preference between legitimate and illegitimate children. It has, however, been held that this privilege does

(1) Ibid s. 12(II & III). See also Hindu Law Past and Present p. 236.

(2) Ibid explanation to s. 12.

not extend to an illegitimate grandchild who in this particular case was an illegitimate child of the legitimate child of a woman.(1) Although their Lordships of the Mysore Chief Court did not distinguish openly between the case of an illegitimate child of a legitimate child of a woman and a legitimate child of her illegitimate child it appears from their Lordships' reasoning as well from the analogy furnished by the case of a legitimate child of an illegitimate child of a Śūdra, that a legitimate child of an illegitimate child of the woman would have been considered as her heir. It would be seen later on how the Mysore enactment is at the basis of the prominent changes introduced into Hindu law by the Hindu Succession Act, 1956.

As compared with the Mysore enactment, the Baroda Hindu Nibandha of 1937 is much more of a comprehensive and consolidatory nature but contains very little which may be considered as a spectacular deviation from the ordinary Hindu law.(2) It may

(1) Gangamma v. Veerappa (1947) 26 Mys. L.J. 50.

(2) As a result of its consolidatory nature the Hindu Nibandha of 1937 has repealed all other previous Baroda enactments concerning marriage, debts, adoption, succession, joint family, viz. Hindu Vidhava Nibandha of 1901; Hindu Lagna Nibandha of 1905; Hindu Vadilarjita Karaja Niyamana Nibandha of 1907; Hindu Dattaka Nibandha of 1910; Hindu Varsa Nibandha of 1900; Hindu Avibhakta Kutumba Nibandha of 1910; Hindu Mabapa and Putra Nibandha of 1910; Hindu Milkatani Vyavastha Nibandha of 1910 and Hindu Lagnavichchēda Nibandha of 1931.

roughly be said that it only makes precise the complicated and the already ascertained law of the Bombay School adding, at some places, a few more complications of its own. To begin with, woman's property has been divided into two categories viz. strīdhana and 'woman's other property'. (1) Up to this the old Hindu law is conterminous with the Baroda enactment. But then the latter category is again divided into property in which a woman has limited ownership and the one in which she has absolute ownership. (2) A further examination of these and of the lines of succession thereto discloses a very strong influence of the Mayūkhya on this enactment.

Strīdhana includes four categories, namely, yautaka, ayautaka, sulka and other property obtained with the help of the property mentioned in these categories. Yautaka includes adhyagni, adhyāvāhanika, and prītidatta strīdhana where as ayautaka includes saudāyika, anvādheya, ādhivedanika and vṛitti. All these terms have been defined in the same śāstric way in general. Sulka includes palla, which is common all over Gujrat, or property given by the father-in-law in lieu of the household things. The second alternative explanation is obviously accepted from the Mayūkhya. (3) The phrase

(1) Hindu Nibandha of 1937 Sec. 5 sub-sec. dha and na.

(2) See ibid s. 43 (2), 193(7). For the effect of this distinction see ss. 132 220-21, 224 etc. However, while defining woman's limited estate, which the Act wants to put on equal par with the widow's estate, as known to ordinary Hindu Law, the terms 'svatva' and 'svāmitva' have been used as indiscriminately as has been done by commentators like Mitra Miśra and others. Consequentially we get such queer terminology as 'svatva of svāmitva' - See s. 5 sub-sec. chcha. Common

(3) Hindu Nibandha 1937 s. 5 (dha). For palla which is most in Gujrat and which consists of money given to the bride at the time of her marriage by the bridegroom or his family see supra pp. 27-28.

"woman's other property" includes property obtained by inheritance or partition, gained from the last surviving coparcener of a joint family, given by strangers, acquired with one's own skill or labour, purchased, acquired with profits, and includes all other property, except strīdhana, acquired in any manner whatsoever. (1) This last category would include property acquired by adverse possession, finding etc. This last category together with gifts from strangers and property acquired with one's own skill or labour, becomes strīdhana of a woman after her husband's death. It is obvious that the two categories of women's property in the Act, namely, strīdhana and woman's other property represent the two supposed categories in the Mayūkha, namely technical and non-technical strīdhana. (2). But a few more provisions in the Act make the matter further complicated. From amongst the categories mentioned in "woman's other property" property obtained by partition and property obtained by inheritance from a male by a widow, mother or widow of a sagotra sapinda is not to be her absolute property. The latter rule is again not uniform: if the widow etc. get an inheritance which is worth upto Rs. 12000 they get an absolute estate in the same; if it is worth more than Rs. 12000 they get absolute estate to the extent of property worth Rs. 12000 and limited ^{interest} in the rest. The figure of

(1) Hindu Nibandha s. 5 (na).

(2) This interpretation of the provisions of the Mayūkha which has been accepted on all hands has been specifically disproved in this thesis with the help of the customary law in Gujrat as well as the text of the Mayūkha. See supra pp. 88-96.

Rs. 12000 here appears to be as arbitrary as the figure of 2000 panas declared by Vyāsa as being the limit of the sum to be given to the woman for her maintenance. (a) Excepting these ^{two} categories consisting of property acquired by partition and, in some cases, by inheritance all other categories of "woman's other property" become woman's absolute estate. With the exception of the concession upto Rs. 12000 granted to the widow etc. which compares favourably with the absolute right of such females under the Mayūkha law to dispose of the inherited movables during their lifetime (2), it appears that the two categories under this Act, namely, strīdhana and woman's other property' over which she has absolute control represent nothing but the sum total of the categories of strīdhana as known to the Bombay School. Except the special lines of succession prescribed under this Act there is hardly any characteristic distinction between these two categories.

A woman can have independent transaction with strangers though her liability would be limited under this Act, to her strīdhana or her 'other property' in which she has absolute estate. (3) She can also freely dispose of the property coming under these two heads. (4) Provisions as regards the husband's

(1) Hindu Nibandha ss. 43 (2), 193(1). But for the text of the verse and the attempted explanation of the figure 2000 see supra.

(2) Supra pp. 156-59.

(3) Hindu Nibandha s. 132.

(4) Ibid s. 224.

the —
 right to utilise stridhana of his wife and, in some cases, to return it are almost a replica of the old sastric provisions.(1)

For the purpose of succession a married woman's property has been divided into three categories (2): stridhana, woman's other property in which she has absolute estate and woman's other property in which she has limited estate. The last category of property devolves upon the heirs of the husband of the female proprietress. Stridhana of a married woman devolves successively upon the following heirs: sons and daughters, daughter's sons and daughter's daughters, son's sons, husband, mother, father, sister, brother, sister's son, brother's son, heirs of the husband, and heirs of the father.(3) Thus for the purpose of succession distinctions based on things such as the kind of stridhana or the form of marriage have been totally discarded. It is noteworthy that though sons and daughters have equal importance in this line the issue of a daughter excludes the issue of a son; that the parents of the propositus and her brother and sister have a much more reasonable place in this line than the one they have under the Mysore enactment or the Hindu Succession Act of 1956; that the first two secondary sons

(1) Ibid ss. 125-26.

(2) All the property of an unmarried female devolves upon full brother, mother, father and father's heir i.e. according to the same old sastric order - See ibid s. 218. For succession under this enactment see also Hindu Law Past and Present pp. 227-29, 235-36.

(3) Ibid. s. 219.

mentioned in Brihaspati's text gain a tremendous advantage over the others mentioned in that text.(1) Woman's other property over which she has absolute control devolves upon her own heirs in the following order: son, son's son, son's son's son, daughter, daughter's son, daughter's daughter, husband, mother, father, sister, brother, sister's children, brother's children, husband's heirs, and father's heirs.(2) The order has been evidently been influenced by the order prescribed in the Mayūkha for the so-called non-technical stridhana. From the fact that the male issue of a woman has been given an outright preference over the female issue it seems that the Act, in common with Nīlakaṇṭha and many other commentators, intends to retain such property in the family of the husband of the propositus; if such is the case, the preference given to woman's own heirs in her parents family over her husband's heirs appears to be inconsistent with such intention.

In the end one special provision, which appears to be quite modern, must be noted. If a woman has obtained some property from the husband and if divorce is granted to the husband on account of the adultery of the wife the judge can make arrangement whereby the woman will have to return any part of that property to the husband for the benefit of the husband, the issue of marriage or both.(3) This seems to be a counterpart of the custom

(1) For Brihaspati's text see supra.

(2) Hindu Nibandha s. 220.

(3) Ibid s. 173.

amongst the Kamma families in Andhra whereby upon estrangement the husband is required to return to the wife all the property which has been given to him by the bride's family.(1) Taking into consideration the fact that divorce and remarriage have been quite common under customary law in Gujrat and that they would soon become common all over India, provisions of such type need special attention. We have now to turn to the Hindu Succession Act to see the extent of the changes introduced by the same and to examine whether the drafting of this enactment has been benefited by the previous attempts on the same line.

That the most important innovation introduced by the Hindu Succession Act of 1956 is its provisions concerning women's property can be easily seen from the fact that almost all the reported cases based upon this Act were concerned directly or indirectly with the interpretation of these provisions. Section 14 of the Act which confers on woman absolute interest in all property possessed by her runs as follows:-

14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.- In this subsection, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription or in any other manner whatsoever, and also any such property held

(1) See ^aPrandhamayya v. Navaratna A.I.R. 1949 Mad. 825. See also Hindu Law Past and Present p. 237.

as
by her ^{as}stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section(1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

The ambiguous wording of the section which centres around the phrase 'possessed by' gives rise to several questions:-

(I) Whether these words denote only possession of a woman or her ownership or both?

(II) Whether the section refers to property possessed by a woman at, after or even before the Act came into force?

(III) If it does not apply to property ^{which} was possessed by a woman only before but not at the time when the Act came into force, to whom will such property belong?

It is evident that the words 'possessed by' do not mean the mere possession of a woman since in that case a woman who is possessor of a property even as a tenant or lessee would get an absolute interest in that property.(1) The question of interpreting this phrase came, for the first time, before their Lordships of the Andhra Pradesh High Court in Venkayamma v. Veerayya (2) who observed that "The object of the Act was to confer benefit on Hindu females by enlarging their limited interest in property inherited or held by them into an absolute estate, with retrospective effect,

(1) See Krishna Dassi v. Akhi Chandra Saha A.I.R. 1958 Cal. 671 at 673 for a suggestion to this effect.

(2) A.I.R. 1957 And. Pra. 280.

if they were in possession of the property...."(1) Viswanath Sastri J. further explained that possession in this context has a broader sense and means "the state of owning or having in one's hands or power." He accordingly decided that the possession need not be physical and that the possession of a licensee, lessee or mortgagee from a woman is tantamount to possession of the woman herself.(2) He correctly went to the extent of holding that even if the property were in the hands of a trespasser whose title has not been perfected by the statutory period the female owner^{would} be recognised as being in possession of the property.(3) Supporting this interpretation in Marudakkal v. Arumugha(4), Subrahmanyam J. rightly remarked that the words 'Possessed' and 'held' in s. 14 mean one and ^{the} same thing and that the 'parliamentary draftsman' should have better used the latter word in the place of the former.

(1) Ibid. at p. 284.

(2) Ibid at p. 281, followed in Marudakkal v. Arumugha A.I.R. 1958 Mad. 255 at 260, Sansir Patelin v. Satyabati A.I.R. 1958 Ori. 75 at 76, Arumugha v. Nachimuthu A.I.R. 1958 Mad. 459, Krishna Dassi v. Akhil Chandra A.I.R. 1958 Cal. at 673-74. For a detailed discussion of the meaning of the word 'possession' See Arumugha v. Nachimuthu Supra.

(3) Venkayamma v. Veerayya A.I.R. 1957 And. Pra. 280 at 281 followed in Marudakkal v. Arumugha A.I.R. 1958 Mad.255, Krishna Dassi v. Akhil Chandra A.I.R. 1958 Cal. 671 at 674, but dissented from in Sansir Patelin v. Satyabati A.I.R. 1958 Ori. 75. It is obvious that possession in such case falls outside the scope even of actual or constructive possession - see Krishna Dassi's case supra at p. 671. Where, however, the trespasser's title had been perfected by statutory period the woman was held not to have been benefited by s. 14 of the Act - Patha Pedda Elliah v. Palagiri Ganamma A.I.R. 1957 And. Pra. 776

(4) A.I.R. 1958 Mad. 255 at 260.

Discussing all the previous view expressed on this point by their Lordships of the different High Courts Mullick J. in Krishna Dassi v. Akhil Chandra (1) made the interpretation more precise by stating that the words 'possessed by' mean 'ownership which gives right to possession'. The liberal interpretation has not been dissented from in any of the reported cases. Accordingly it has been held that where a woman has mortgaged property in which she has limited interest but has not sold her equity of redemption the property is deemed to be possessed by her.(2). Similarly where in a partition suit the property of a female limited owner was in the hands of the receiver it was held that the woman possessed the property.(3)

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As early as in January their Lordships of the Supreme Court declared that "there is no doubt that by reason of the expression 'whether acquired before or after the commencement of the Act' the section is retrospective in effect."(4) Since then it has been admitted in almost cases that the section is retrospective in, at least, as much as it applies to the property acquired by the woman before the commencement of the Act. The use of the word 'retrospective' in this sense is loose and probably misleading; for, if it is accepted that the operative part of the section which transforms existing limited estates into absolute

(1) A.I.R. 1958 Cal. 671 at 674.

(2) Arumugha v. Nachimuthu A.I.R. 1958 Mad. 459.

(3) Krishna Dassi v. Akhil Chandra A.I.R. 1958 Cal. 671.

(4) Kamala Devi v. Bachulal A.I.R. 1957 S.C. 434 at 444. The provisions of the Succession Act are applicable to a case even in its appellate stage - Laxmi Debi v. Surendra Kumar A.I.R. 1957 Ori. 1 followed in Bhabani Prosad v. Sarat Sundari A.I.R. 1957 Cal. 527. But usually a statute does not retrospectively affect vested interests - Balwant Singh v. Sardarni Balwant Kaur A.I.R. 1957 Pepsu 1.

ones comes into operation only after the Act comes into force then the section must be held to be prospective and not retrospective. The change brought about by the enactment, in such case, does not precede the enactment but succeeds it. However, for the time being at least, there were two views amongst the High Courts of India as regards the extent of the retrospectiveness of s. 14 of the Act. It may be stated at the outset that almost all these cases consider the question whether the reversioners of the last full owner have a right to ask for a declaratory decree by impeaching any alienation made by a female limited owner without legal necessity and before the commencement of the Act.

Observing that a widow who has, before the enactment came into force, sold without legal necessity her property inherited from her husband 'retains no right or interest in the property'. Sastri J. in Venkayamma v. Veerayya(1) held that in such case s. 14 does not apply and that reversioner has a right to get the declaratory decree. This Andhra case was unreservedly followed by their Lordships of Punjab, Calcutta, Kerala, Madras

(1) A.I.R. 1957 Andh. Pra. 280 at 284.

and Orissa High Courts.(1) In Gostha Behari v. Haridas(2), Sarkar J. pointed out that the words 'whether acquired before or after the commencement of this Act' refer to the word 'property' and not to the word 'possessed' so as to mean 'possessed at any time', 'as it would affect interests already acquired or vested and such cannot be deemed to have been the intention of the legislature, in the absence of express words to that effect.'(3) In the same case Mookerjee J. also rejected such a retrospective interpretation remarking that in that case the words in the section ought to have been "shall be deemed to have been held" instead of "shall be held" as they, at present,

(1) Hari v. Hira A.I.R. 1957 Pun. 89, Gostha Behari v. Haridas A.I.R. 1957 Cal. 557, Thailambal v. Kesavan A.I.R. 1957 Kerala 86, Patha Pedda v. Palagiri Gangamma A.I.R. 1957 Andh. Pra. 776, Chandra-sekhara v. Sivaramakrishna A.I.R. 1958 Kerala 142, Marudakkal v. Arumugha A.I.R. 1958 Mad. 255, Sansir Patelin v. Satyabati A.I.R. 1958 Ori. 75, Arumugha v. Nachimuthu A.I.R. 1958 Mad. 459. In a case where a widow who had inherited property from her son got remarried before 1956 according to the customary law their Lordships of the Bombay High Court held that she forfeited her property and that section 14 is not applicable to such case as there is nothing in the Act which 'revives the estate of a limited Addition to p.658 note 1: ... of the Act by death.

However the property in which a widow has secured absolute estate by virtue of s.14 of the Succession Act cannot be divested from her on the ground that a son had been adopted to her co-widow and that such adoption has been sanctioned ex post facto though after the commencement of the Act - see Yamunabai v. Ram Maharaj (1959) 61 Bom.L.R.1316.

death has a right to ...

(2) A.I.R. 1957 Cal. 557.

(3) Ibid at p. 559.

and Orissa High Courts.(1) In Gostha Behari v. Haridas(2), Sarkar J. pointed out that the words 'whether acquired before or after the commencement of this Act' refer to the word 'property' and not to the word 'possessed' so as to mean 'possessed at any time', 'as it would affect interests already acquired or vested and such cannot be deemed to have been the intention of the legislature, in the absence of express words to that effect.'(3) In the same case Mookerjee J. also rejected such a retrospective interpretation remarking that in that case the words in the section ought to have been "shall be deemed to have been held" instead of "shall be held" as they, at present,

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(2) A.I.R. 1957 Cal. 557.

(3) Ibid at p. 559.

stand in the section.(1) To the extent that such property does not come within the purview of s. 14 of the succession Act, these decisions were correct. As for the other part, namely, about reversioner's right to get a declaratory decree, we shall presently see that decisions have adopted a deceptive ratio.

Their Lordships of the Patna High Court took a different view of the situation. They held that s. 14 of the Succession Act has been made deliberately retrospective so as to abolish widow's estate in all cases as a result of which the whole class of reversioners also has been abolished.(2) Explaining more clearly the meaning of s. 14 Prasad J. in Ramsaroop v. Hiralall (3) observed that by virtue of s. 14 a female Hindu "shall have full right as owner in all properties acquired and possessed before or after the commencement of the Act". Commenting on the above-quoted remarks of Mookerjee J. that in that case the legislature would have inserted the words "shall be deemed always to have been held" Misra J. in Ramsaroop's case attempted to give a feeble

(1) Ibid at p. 560. His Lordships further observed that the section "does not seek to affect past transactions by declaring that the law (which was admittedly different and which was being changed by the section) shall be deemed to have been always or in the past as enacted in the section. It is, in that sense, purely prospective legislation and in no way retroactive or retrospective." See also Marudakkal v. Arumugha A.I.R. 1958 Mad. 255 at 258 wherein their Lordships relied upon the principle that every Act speaks from its commencement.

(2) Ram Ayodhya v. Ragnunath A.I.R. 1957 Pat. 480 followed in Dhanvatia v. Deonandan A.I.R. 1957 Pat. 447, Dhirajkunwar v. Eakhansingh A.I.R. 1957 Mad. Pra. 38, Mankunwar v. Mt. Bodhi A.I.R. 1957 Mad. Pra. 211 Janki Kuer v. Chattu Prasad A.I.R. 1957 Pat. 674, Baijnath v. Ramautar A.I.R. 1958 Pat. 227, Ramsaroop v. Hiralall A.I.R. 1958 Pat. 319.

(3) A.I.R. 1958 Pat. 319

defence by saying : ".... however, it is difficult to make the language of any statute so exhaustive as to cover all the situations. It may well be that the section could have been more clearly worded." (1) He accordingly countered the suggestion by saying that words 'at the commencement of the Act' were needed to be put immediately after the words 'any property possessed by a Hindu female' for the purpose of limiting the full retrospective operation of the section. This view about retrospective operation s. 14 of the Act was accepted in Madhya Bharat also. (2) Recently, however, their Lordships both of the Patna and Madhya Bharat High Courts ^{have} unexpectedly taken an 'about turn' and have held that property which is alienated by a Hindu female before the commencement of the Act does not come under the operation of s. 14 and that the reversioners have a right to sue for a declaratory decree in respect of property which has been alienated without legal necessity by a female limited owner before the commencement of the Act. (3). It may be remarked at this stage that as regards the latter part of these decisions the original position of the Patna High Court was sound and correct.

Their Lordships of the Allahabad High Court took a more sensible view of the situation and cut a midway path between the view of the Andhra High Court and the original view of the

(1) Ibid at. 324.

(2) See supra note (1) above.

(3) Harak Singh v. Kailash Singh A.I.R. 1958 Pat. 581 F.B.
Lukai Katikram v. Niranjana A.I.R. 1958 Mad. Bha. 160 F.B.

Patna High Court. Admitting that section 14 is "retrospective in some respects and prospective in some" their Lordships held that a woman who has alienated her property before the commencement of the Act cannot be benefited by s.14.(1) At the same time they held that reversioners under the old law have no right to claim a declaratory decree as the whole class of reversioners has been totally abolished by the enactment. However, the ratio adopted by them for this latter proposition was different from the one followed by their Lordships of the Patna High Court, who held that it is because of s. 14, which retrospectively widened the widow's estate into a full estate, that the class of reversioners has been abolished. Their Lordships of the Allahabad High Court, on the other hand, accepted that the female in such case does not get full estate but, following the view formerly propounded by Dr. J.D.M. Derrett, they held that as a result of the new scheme of succession introduced by the new Act which totally replaced the old scheme of succession under ordinary Hindu Law, the reversioners under the latter have now ceased to be so and that heirs to such alienated property will have to be ascertained in accordance with the provision of Act.(2) This leads us to the third question after the full discussion of which we shall feel convinced that the view adopted by the Allahabad High Court is the proper one.

(1) B. Hanuman v. Mst. Idrawati A.I.R. 1958 All. 304.

(2) Dr. J.D.M. Derrett: Problems under the Hindu Succession Act (1959) Bom. L.R.J. 33 at 49 quoted with approval in A.I.R. 1958 All. 304 supra at p. 310. But Dr. Derrett no longer accepts his earlier view and rejects both the Patna and the Allahabad doctrines, preferring the Bombay High Court view point which is shared by Andhra, Madras etc.

If it is admitted that property which has already been alienated by a woman before the commencement of the Act does not come within the purview of s.14 the next question is this: if she has alienated property without legal necessity or benefit to the estate to whom does the remaining interest belong after the commencement of the Act? It is an accepted position that so far as the female limited owner is concerned the alienation without legal necessity is not void but voidable at the instance of the reversioners and that the interest of the female herself is completely transferred to the alienee.(1) In such case it has been held that as the object of the Act was primarily to benefit the female limited owner and not her alienee the latter does not get any benefit out of s. 14 of the Act: when he purchased property from the widow he did so with open eyes knowing fully well that he was entering into transaction without any legal necessity on the part of the female limited owner, and following the principle that transferee can get only as much as the transferor had, the purchaser gets only a limited interest in the property and must remain content with it even after the commencement of the Act.(2)

(1) Harak Singh v. Kailash Singh A.I.R. 1958 Pat. 581 F.B. at 584-85.

(2) Venkayamma v. Veerayya A.I.R. 1957 And. Pra. 280, Marudakkal v. Arumugha A.I.R. 1958 Mad. 255 at 260, Arumugha v. Nachimuthu A.I.R. 1958 Mad. 459, Lukai v. Niranjana A.I.R. 1958 Mad. Pra. 160 F.B., Harak Singh v. Kailash Singh A.I.R. A. 1958 Pat. 581 at 583.

In Harak Singh's case their Lordships of the Full Bench observed that in interpreting a statute it is legitimate to consider the previous law and the mischief which the new law seeks to establish and that the Court must adopt such construction as would suppress the mischief and advance the remedy.

It has also been held that the rule of interest feeding the estoppel which has been incorporated in s. 43 of the Transfer of Property Act does not apply to such alienated property and does not increase the interest of the female owner therein.(1) As neither the female owner nor the purchaser is entitled to the remainder it is evident that it is the next heir to the property who would be entitled to the remainder. The question as to who that heir can be would be discussed below while dealing with the order of succession introduced by the Act.

The words 'gift from any person' appearing in the explanation to s. 14 mean a valid gift. Accordingly where a female limited owner made a gift over of her inherited property to her granddaughter and such gift was invalid according to the Punjab customary law by which the female was governed it was held that the granddaughter was not benefited by s. 14 and that after her grandmother's death she remained in possession of the same only as a trespasser.(2)

According to sub-section(2) of s. 14 a woman shall have only limited estate in property which has been acquired by her by way of gift or under a will, instrument, decree etc. if the terms of such gift, will, instrument, decree etc. prescribe only limited estate. But a case came before the Calcutta High Court in which

(1) Arumugha v. Nachimuthu A.I.R. 1958 Mad. 459.

(2) Mst. Dasi v. Mst. Kapura A.I.R. 1958 Punj. 208.

a preliminary decree was passed by the lower Court whereby, under the Hindu Women's Rights to Property Act of 1937, certain property representing her husband's share was allotted to a widow to be enjoyed by her in the manner prescribed for a Hindu widow. The question was whether the widow was entitled to an absolute interest in the property by virtue of s.14(1) or whether the property came under sub-section(2) of s. 14. It was held that the widow in this case acquired an interest in the property not by the preliminary decree but by succession under the Hindu women's Rights to Property Act and that despite the limited interest conferred on her by the decree she acquired absolute interest in the property after the commencement of the Act.(1) It has also been held that although the Hindu Succession Act repeals the Hindu Women's Rights to Property Act it does not affect in any way the rights already vested in a female in consequence of the provisions of the latter so that where a female has acquired such right under the Hindu women's Rights to Property Act but has not taken steps to enforce her right to ascertain and take possession of her share, the Hindu Succession Act does not make her right imperfect or render it inchoate in any manner.(2)

(1) *Hiralal Roy v. Kumud Behari* A.I.R. 1957 Cal. 571; *Smt. Billasbasini v. Dulal Chandra* A.I.R. 1958 Cal. 472; *Krishna Dassi v. Akhil Chandra* A.I.R. 1958 Cal. 671. It ought to be suggested, however, that the word 'interest' is a better substitute for the word 'property' in s. 14(2).

(2) *Kuppathammal v. Sakthi* A.I.R. 1957 Mad. 695.

The effect of s. 14 is radical and far-reaching. It has destroyed the distinction between strīdhana and widow's estate. The Mitākṣarā definition of strīdhana has been accepted in toto. Property inherited by a woman and acquired by her at partition now becomes her absolute estate. As regards property acquired by her own skill or labour, by adverse possession, by gift or will etc. it has already been observed that the trend of the modern courts was to interpret the Śāstra as well as precedents, as far as possible, in favour of the woman. But even in those categories a few presumptions based upon sex distinctions were unfavourable to women. The sex distinction has disappeared. The inequality has been removed. So far as acquirement of property is concerned woman stands shoulder to shoulder ~~to~~ and on par with man. However, the section which brought about this dynamic change could, as we have already observed, have been better worded. Even the Mysore enactment(1) uses the more appropriate words 'belonging to' in the place of the words 'possessed by' found in s. 14 of the Hindu Succession Act. Moreover, as pointed out by their Lordships of the Allahbad High Court the Act does not make any specific provision for property alienated by a Hindu female before the commencement of the Act and without legal necessity.(2) Such provision would have

(1) Mysore Hindu Law Women's Rights Regulation X of 1933 s.10(1) supra.

(2) B. Hanuman v. Indravati A.I.R. 1958 All. 304 at 310.

put an end to much unnecessary litigation. It must be pointed out here that as regards property inherited by a widow Before the Act and possessed by her at the time of the commencement of the Act, the legislation has done much injustice to the daughter. But for the Act, the daughter, who in such case had a spes successionis, would have succeeded to her father's property after the death of the widow. Even if her father had died after the commencement of the Act she would have succeeded to her father's property equally and simultaneously with the widow.(1) But in the case of property already inherited before the Act by the widow she gets neither this nor the ^{other} benefit. The Mysore Provision in such case is remarkable indeed and ought to have been remembered by the Indian legislators.

As for the part of the Act dealing with succession we find that certain kinds of property ^{are} expressly excluded from its operation. They represent property to the descent of which the Indian Succession Act is applicable by virtue of s. 21 of the Special Marriage Act 43 of 1954, estate which descends to a single heir by terms of any enactment etc. S. 6 of the Act which deals with joint property runs thus:-

"6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

(1) Triveni Devi v. Sharda Devi A.I.R. 1958 All. 773.

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

It is evident that the words 'after the commencement of this Act' are superfluous in view of s. 6 of the General Clauses Act according to which an Act does not affect interest already vested under the old law.(1) The words appear to be all the more redundant as the construction of the section is such that its main purpose appears to ~~to~~ exclude, with certain exceptions, the Mitākṣarā joint family property from its operation. Thus the words 'after the commencement of this Act' are tantamount to words 'even after the commencement of this Act'. This being the case it seems it would have been better if this section were added as sub-section(iv) to sec. 5, with an exception incorporating the paragraph beginning

(1) In view of s. 6 of the General Clauses Act the words "shall devolve by survivorship and not in accordance with this Act" occurring in s. 6 of the Hindu Succession Act would have applied even otherwise only to the interest of a coparcener who has died after the Act. It may be argued that the words were necessary to meet a situation in which the coparcener has died before the Hindu Succession Act but his interest has been taken by his widow under the Hindu Women's Rights to Property Act and the latter dies after the Succession Act. But ~~this~~ is not true because his share, in such case, does not devolve as his interest in coparcenary property but devolves as his personal property upon his own heirs. - See Mayne, 11th Edi. p.708.

with the words 'provided that'. It is evident that as class I of the Schedule (1) contains many heirs who are females or cognates of the propositus the Mitākṣarā joint family property would be going into speedy disintegration. It is, however, remarkable that the Act does not give to such heirs any share at a partition of the coparcenary property; so they can acquire interest in coparcenary property only by intestate succession. As they have no present right to property it is possible for the present members of the coparcenary to prolong by mutual agreement or devise its pre-enactment structure. Thus in joint family property, at least, females have not been given equal rights with the males.

The Act has introduced revolutionary changes in succession to separate property of males and females. As succession to female's property devolves, in certain cases, upon 'the heirs of the husband' and 'the heirs of the father' it can hardly be treated separately from succession to male's property. Before entering into detailed discussion the main provisions of the Act regarding succession ought to be noticed ad verbum. Provisions about succession to separate property of males are contained in ss. 8-13.

Sections 8 and 9 are as follows:-

" 8. The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter:-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(1) See infra.

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so in succession."

According to s. 10 the mother, son and daughter shall take one share each and the widow or all the widows together shall take one share. Amongst the branch of a predeceased child, which gets one share, the divisions would take place in the following manner, namely, if the child were a predeceased son, his widow or widows together, son, daughter and the branch of his own predeceased son would get equal portions; if the child were a predeceased daughter her sons and daughters would get equal portions. Amongst the heirs mentioned in class II of the Schedule heirs mentioned in any one entry shall take equally. According to s. 19 all the heirs taking simultaneously take as tenants-in-common and not as joint tenants.

The order of succession amongst agnates and cognates has been considerably simplified by the three rules given in s. 12 which runs as follows:-

" 12. The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:-

Rule 1.- Of two heirs, the one who has fewer or no degree of ascent is preferred.

Rule 2.- Where the number of degrees of ascent is the

same or none, that heir is preferred, who has fewer or no degree of descent.

Rule 3.- Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simulteneously."

Before going over to provisions about succession to female's property the Scheduled heirs to male's property ought to be noticed. They are:-

Class I

"son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son."

Class II

- " I. Father.
- II. (1) son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.
- III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.
- IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.
- V. father's father; father's mother.
- VI. father's widow; brother's widow.
- VII. Father's brother; father's sister.
- VIII. Mother's father; mother's mother.
- IX. Mother's brother; mother's sister.

Explanation.- In this Schedule, reference to a brother or sister do not include reference to a brother or sister by uterine blood."

The whole law of succession to female's property is condensed into two sections which run as follws:-

"15. (1) The property of a female Hindu intestate shall devolve according to the rules set out in section 16,-

(a) firstly, upon the sons and daughters(including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. The order of succession among the heirs referred to in section 15 shall be, and ^{the} distribution of the intestate's property among those heirs shall take place according to the following rules, namely:-

Rule 1.- Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.- If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.- The devolution of the property of the intestate on heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death."

Before examining these sections in detail it is necessary here to determine the question which has been left pendant in our discussion, namely, who is entitled to the property which had been inherited by a woman but has been disposed of by her before the commencement of the Act and without legal necessity?

Such inherited property may be of two kinds: it may be separate property of the last full owner who is a male or may be strīdhana of the last female propositus. If the Act had not been passed, the next heir, in the former case, would have been the nearest reversioner to the last male propositus; in the latter case the next heir would have been the person who ^{would have been} ~~was~~ entitled to strīdhana of the last female propositus immediately after the female heir who had inherited the same. To take a concrete example of the latter case if a woman governed by the Benares School had died leaving a son and a daughter then the daughter would have taken a life-estate in her mother's strīdhana and the son would have succeeded after the daughter's death. Similarly, ^{even} if the daughter had alienated her mother's strīdhana without legal necessity, on the death of the daughter, it would have devolved upon the son. The question is whether the position remains the same even after the commencement of the Hindu Succession Act 1956.

The answer to this question is to be found in the phrase 'dying intestate' occurring both in section 8 and section 15 which lay down new orders of succession for male's and female's property respectively. The same phrase was incorporated in the preamble of the Hindu Law of Inheritance (Amendment) Act II of 1929 (1) which amended the Mitākṣarā order of succession in as

(1) See infra. See also the phrase 'dies intestate' occurring in the Hindu Women's Rights to Property Act ss. 2 & 3(1).

much as it provided that son's daughter, daughter's daughter, sister and sister's son shall, in that order, be entitled to inherit a male's property in default of his paternal grandfather and in preference to his paternal uncle. Question arose before their Lordships of the Privy Council as to whether the new order applies to property of the deceased who had died before the commencement of the Act but whose property had been inherited by a female owner who herself died after the commencement of the Act. (1) Accepting implicitly the ratio that the deciding factor is ^{the} time when succession to the property opened - and in this case it obviously opened again after the death of the limited owner - Dr. Jayakar observed that the words 'dying intestate' "are a mere description of the status of the deceased and have no reference and are not intended to have any reference to the time of the death of a Hindu male. The expression merely means 'in the case of intestacy of a Hindu male.' " It was accordingly held that in the given case succession devolved in accordance with the order renewed by the Act of 1929.

The question involved in the above interpretation of the Hindu Law Inheritance (Amendment) Act is on all fours with the question under our consideration. It is evident that the purchaser of the property alienated by a female limited owner without legal necessity and before the commencement of the Act gets only limited interest in the property and that his interest extends only up to the life of the female owner upon whose death succession

(1) Lala Duni Chand v. Anar Kali (1946) 73 I.A. 187.

to the last full owner opens again.(1) In such case it is evident that the heirs to such property, may it be separate property of a male or stridhana of a woman, are to be ascertained in accordance with the order of succession laid down in the Hindu Succession Act of 1956. It is thus evident that the class of reversioners under the old law has been completely abolished. The authority, therefore, behind the decisions in which their Lordships of the various High Courts granted declaratory decrees to the reversioners, is highly questionable.(2) It is, however, important to note that except in one case (3) the question as to who is entitled to succeed to such property was not considered in any of these cases and their Lordships remained content merely with granting declaratory decrees. The question has not come before their Lordships for direct decision in any one of the reported cases. But all the obiter dicta are in favour of the interpretation suggested above. In Harak Singh v. Kailash Singh (4) their Lordships of the full Bench of the Patna High Court accepted that succession to such alienated property opens after the death of the female owner, namely, after the commencement of the Succession Act. In Hari Krishna v. Hira (5) their Lordships confirmed the declaratory decree given by the lower

(1) See supra.

(2) See supra, pp. 657-4. Such declaratory decrees could, however, be

Addition to p.674 note 2:

But for the daughter's right to sue for declaratory decree for the purpose of challenging the validity of an adoption made by her mother on the ground that such adopted son would eventually compete with as her mother's heir under S.15 of the Succession Act see Sugandhabai v. Sundrabai (1959) 61 Bom.L.R.560.

(5) A.I.R. 1957 Punj. 89

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(1) See supra.

(2) See supra. pp.657-9. Such declaratory decrees could, however, be justified, in some cases, on the basis that the reversioners under the old law were just the persons who would have succeeded to the property under the provisions of the new Act. This facet of the question, however, was not considered in these cases.

(3) Hari Krishna v. Hira A.I.R. 1957 Punj. 89.

(4) A.I.R. 1958 Pat. 581 F.B.

(5) A.I.R. 1957 Punj. 89

court in favour of the plaintiff reversioners who were nearest heirs according to the old law but comparatively remoter heirs under the new enactment; but they did so only on the ground that the reversioners were nearest heirs when they instituted the suit so that the litigation was in no way speculative and further observed that the decree would enure to the benefit of any other nearer heir who might succeed to the estate after the widow's death although such heir might not be the plaintiff-reversioners. This nearly amounted to an obiter dictum that the next heirs are to be ascertained in accordance with the provisions of the Act. Their Lordships of Allahabad High Court were more clear on this point. Refusing to grant a declaratory decree to the reversioners they observed: "The customary law of succession has been completely abrogated by the Act which exhaustively amends and codifies the law relating to intestate succession amongst the Hindus.... The next reversioner, who was a creation of the customary law, is no longer in the picture."⁽¹⁾ Mallick J. in Hiralal v. Kumud Behari⁽²⁾ compared, with the help of the decision in Lala Duni Chand's case, the provisions of the Hindu Law Inheritance (Amendment) Act and the Hindu Succession Act 1956 and observed that the succession Act would be applicable to the property

(1) B. Hanuman v. Idravati A.I.R. 1958 All. 304. However, their Lordships were self-contradictory when they observed that succession to such property would devolve on widow's heirs under s.15 and not on husband's heirs under 8; for they had already held that the widow ceased to have any interest in such alienated property and was not benefited by. s.14 of the succession Act. The expression 'customary law' has been loosely used in the place of ordinary Hindu law.

(2) A.I.R. 1957 Cal. 571.

of any person who died before the Act but succession to whose property opens after the Act on account of the intervening life-estate of a female heir. He further explained that " To place this interpretation on the Act is not to give retrospective effect to its provisions, the material point being the date when the succession opens, namely, the death of the widow."

Here a reference must be made to the decision in Lateshwar v. Mst. Uma Ojhain which appears to be the most whimsical amongst the decisions considered in this work. The facts of the case were as follows:- The husband of the defendant and the plaintiffs were coparceners. The defendant claimed that she was entitled to her Husband's property on two grounds, namely, that the husband died separate and that he died after 1937. On the former ground she could have taken her husband's property by succession under the ordinary Hindu law; on the latter ground she could have taken her husband's interest in the coparcenary property by virtue of s. 3 of the Hindu Women's Rights to Property Act. After considering the conflicting evidence on both these points Prasad J. accepted that the husband of the defendant died joint but after 1937 as a result of which he held that the defendant succeeded to her husband's share in the coparcenary and that she acquired absolute interest in the same by virtue of s. 14(1) of the Hindu Succession Act. It would have been better if his Lordship had gone thus far and no further. But assuming the apparently uncalled for duty of supporting the defendant's cause from all its angles his Lordship further

held that for the purpose of this decision it did not matter whether the husband died before or after 1937. To vindicate his decision as regards the interest of a coparcener who had died before 1937 his Lordship suprisingly relied on s. 8 which, according to him, is retrospective on two grounds. Firstly, he compared sections 6 and 8 of the Hindu Succession Act and argued that the words 'after the commencement of this Act' which are incorporated in s. 6 are not to be found in s. 8 and that this distinctive exclusion makes the latter section fully retrospective in its operation. Secondly, he relied on the interpretation which their Lordships of the Privy Council put upon the words 'dying intestate' occurring in the preamble of the Hindu Law of Inheritance (Amendment) Act (1) and observed : "In my judgement, therefore, section 8 will apply to all cases where a male Hindu dies intestate leaving behind his property, irrespective of the time of his death, and the words 'dying intestate' used in s. 8 are a mere description of the status of the deceased, and, have no reference to the time of the death of a Hindu male." The only requisite for the application of s. 8 in his Lordship's opinion, is that a Hindu male should have died intestate 'leaving behind his property'.

The whole reasoning is flimsy and baseless.(2) Firstly, his Lordship ought to have remembered that in the absence of express

(1) Lala Duni Chand v. Anar Kali (1946) 73 I.A. 187 supra.

(2) For a detailed attack on this decision see Dr. J.D.M. Derrett : Anomalous Decisions from Patna on the Hindu Succession Act 1956, (1958) 21 S.C.S. J. 259.

provision to the contrary every Act speaks from its commencement - a principle which was implicitly admitted in a later decision of the Full Bench of the Patna High Court reversing all its previous decisions to the contrary.(1) Secondly, s. 8 has no application at all to the coparcenary property succession to which is governed by s. 6. Thirdly, it has already been pointed out that the words 'after the commencement of this Act' have been almost redundant in s. 6. Moreover, s. 6 being essentially negative in character the words bar even the future application of the provisions of this Act to the devolution of coparcen^a_{ry} interest. The words are not necessary in s. 8 simply because the section is positive and would have a future application to the property concerned whether the words referred to are inserted therein or not. So these words are necessary in s. 6 not to bar its retrospective effect, as Prasad J. thinks, but to eliminate, subject to few exceptions, the possibility even of the future application of the provisions of this Act. In any case it is evident that because of s. 6 of the General Clauses Act neither s. 6 nor s. 8 of the Hindu Succession Act applies to the undivided interest of a deceased coparcener who has died before the commencement of that Act. Succession to his interest is governed either by survivorship or by the Hindu

(1) Harak Singh v. Kailash Singh A.I.R. 1958 Pat. 581 F.B.

Women's Rights to Property Act.(1) Fourthly, the decision in Lala Duni Chand's case does not furnish an analogy for this case at all. The implicit ratio of that case was not that the provisions of the Hindu Law of Inheritance (Amendment) Act governed succession to property of all the males who have died intestate before that Act but that they governed only those cases in which the propositus had died before the Amendment Act and succession to his property had re-opened after the Act. The circumstances in Lateshawar's case and Lala Duni Chand's case⁽²⁾ are, therefore, wide apart from each other; for, prior to the Hindu Women's Rights to Property Act succession to undivided interest of a particular coparcener could take place once only. It is hoped that this eccentric decision would be reversed by the Full Bench at the earliest possible opportunity.

Some of the salient features of the new order of succession to woman's property may be stated here in comparison with the old order of succession to stridhana.

(1) For the purpose of succession the distinction between a married and an unmarried woman, a woman married in approved form and one married in unapproved form, a childless woman and one having children, and, subject to sub-section(2) of s. 15, between

(1) After the death of the female limited owner who takes her husband's share under the Hindu Women's Rights to Property Act the property would devolve not upon the surviving coparcener but upon the heirs of the coparcener whose interest was inherited by such female limited owner. - See Mayne 11th edition p. 708.

(2) Supra.

one and another kind of woman's sparate property has vanished altogether.

(2) The general preponderance in favour of females which used to subsist in succession to stridhana exists no more and now sons and daughters of ^awoman inherit her property equally and simultaneously.(1)

(3) The distinction between a married and an unmarried daughter as well as between a stabilised and unstabilised (apratisthita - more commonly known as 'unprovided for') daughter has ceased to exist.

(4) The doctrine of representation has been newly introduced by the Act so that the daughter of a pre-deceased daughter of the female proposita now competes simultaneously with her own aunt in succession to her grandmother's property. This provision is only a counterpart of the similar provision in succession to male's property.

(5) The husband of the proposita now shares with her children whereas formerly he could succeed only after the children and that too only if he was married to the proposita in an approved form of marriage; if not, he was one of the remotest heirs. The principle underlying this provision appears to be that succession

(1) However, this is by no means a novelty since according to the law of all except the Benares and the Bombay Schools sons and daughters shared at least some kind of stridhana of their mother - see supra.

should devolve simultaneously upon the progeny and the surviving spouse of the deceased.(1)

(6) Subject to subsection (2) of s. 15 and in default of the children and the husband, the heirs of the husband of a woman succeed in preference to all other heirs and in all cases.

(7) Some of the persons who are prominent in the scheme of succession under the Act were utterly unknown as heirs to the old law of strīdhana : daughter's daughter was no heir at all under the law of the Dāyabhāga School; son's daughter, widow of a predeceased son and widow of a predeceased son of predeceased son of the female proposita were ^{not} entitled to inherit her strīdhana according to the Benares or the Dāyabhāga School.

(1)
(8) In view of s. 3(j) illegitimate children of a woman are not entitled to compete equally and simultaneously with the legitimate children of woman.(2) The descendants of the former also stand ⁿ on equal footing with the legitimate descendants of the latter. There is no provision as regards the illegitimate issue of the legitimate issue of a woman. But following the interpretation which their Worships of the Mysore Chief Court put upon

(1) It may be suggested here that in view of this provision of s. 15(1) (a) the husband of a predeceased daughter also should be entitled to succeed along with her issue to the share which comes to her branch in succession to male's and female's property and which is divided amongst her heirs under s. 10 Rule 4 (ii) and s. 16 Rule 2 respectively; for, succession per stirpes in such cases proceeds on a fiction that the predeceased daughter is alive and takes her own share which, under the Act, is equal to her own separate property. If the husband of the deceased herself shares with her own children there is no reason why the husband of the predeceased daughter should not share with her own children.
(2) However they cannot inherit the property of their mother's relations.

a similar provision in the Mysore enactment it appears that such descendants will not be considered as heirs to the woman.

Two outstanding instances of the inconvenience produced by the order of succession under s. 15 (1) must be noticed here. Firstly, as sub-section (1) (a) includes woman's own descendants only to the third degree it is evident that woman's own great-grandchildren can succeed only as 'husband's heirs' and along with the grandchildren of woman's step-children. The defect under the old law, according to which the great-grandson of a woman was unable to find a place prior to her step-great-grandson in the order of succession to her strīdhana, has thus been left unremedied. Secondly, in view of the massive number of the husband's possible heirs it is evident that the parents of a woman stand a very meagre chance of inheriting her daughter's strīdhana. Moreover, unlike the terms sapinda and samānodaka under the old law, the terms agnates and cognates can include a person who is removed from the propositus by any number of degrees. So it would not be a surprise if a person, who is related to the husband of the proposita by twenty degrees upwards and then twenty degrees downwards, stands to defeat the claim of her own father.

As for sub-section (2) of s. 15 it may be said at the outset that it would have been much better if this sub-section had not existed at all in the enactment. The section exhibits vestigial traces of the provisions of Kātyāyana and Vṛiddha

Katyayana to the effect that property given to the bride by her relations in her parent's house devolves, in default of her children, upon those relations (bandhus).(1) The provision nearly amounts to reversion of the property inherited and not disposed of by a deceased woman.(2) The object of the Succession Act being to establish equality between the two sexes there was no reason why this particular characteristic should have been superimposed upon the property of females only.

Moreover, the section has been very badly drafted. The words "not upon the other heirs referred to in sub-section(1) in the order specified therein," which occur both in (a) and (b) of this sub-section may be interpreted so as to negative either of s.15(1) or the right of the heirs mentioned the two things namely, either the order of the heirs specified in s. 15(1) (b), (c), and (e) in respect of property mentioned in s. 15(2) (a) and of heirs mentioned in s. 15(1) (c), (d), and (e) in respect of property mentioned in s.15(2) (b). According to the former interpretation the meaning of s. 15(2) (a), for instance, would be that succession to property mentioned therein would devolve firstly, upon the heirs of the father but that the rights of the other heirs mentioned in s. 15(1) are not totally denied

(1) For a similar custom in the Kathiawar states see Bhagwanji Vashram v. Wala Godad (1892) III Kathiawar Reports 105.

(2) See the Law Relating to Hindu Succession Government of India Publication (1956) pp. 15-16.

and that such heirs ~~are entitled to succeed to property mentioned in s. 15(1) are not totally denied~~ and that such heirs are entitled to succeed to property mentioned in s. 15(2) (a), in default of the heirs of the father of the deceased. According to the latter interpretation only the heirs of the father are entitled to inherit the property of woman which she inherited from her father or mother but the other heirs mentioned in s. 15(1), except her own children, would not at all be entitled to inherit. A further analysis of either of these interpretations exposes the defective arrangement of this Act. If it is presumed that the words under consideration affect only the priority in the order of succession mentioned in s. 15(1) then it is evident that the whole of s. 15(2) (b) is redundant; for, even in the absence of this part of the sub-section the property mentioned therein would have devolved first upon the heirs of the husband of woman in preference to any other heirs mentioned in s. 15(1) except the woman's own children. Moreover this interpretation would lead to mischievous results. For instance, the property which a woman has inherited from her own mother would devolve upon the "heirs of the father"(1) in preference to the father himself who is mentioned as an heir in s. 15(1) (c). If the second interpretation is accepted, namely, if the words under consideration are considered as totally denying the right of any

(1) In accordance with the provisions of s. 16 Rule 3 "the heirs of the father" will have to be ascertained upon a fiction that the father of the proposita owned the property and that he died intestate in respect thereof immediately after the death of the proposita herself, thus the term 'heir' has been used in the Act not in its legal but popular sense.

heir other than the ones who are mentioned in s. 15(2) (a) and (b) then we come to a ridiculous position, namely, as regards property inherited by a woman from her mother, her father cannot inherit the same but " the heirs of the father" can. Moreover, in such case the words ' in the order specified therein' become redundant in s. 15(2) (a) and (b). It is thus impossible to extract any sensible meaning from this whimsically drafted section. But the intention of the legislature appears to be to create two orders of succession somewhat similar to the two orders which were known to the old Hindu law and which were based on the distinction of the form of the marriage in which the deceased woman was married: in one case the husband and his heirs were preferred to the father and his heirs; in the other, the father and his heirs were preferred to the husband and his heirs. If such was the intention of the legislature then this awkward sub-section must be redrafted as follows :-

" (2) Notwithstanding anything contained in sub-section (1), (a) any property inherited by a female from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), upon the heirs mentioned in sub-section (1) (c), (d), (e), and (b) in that successive order." Part (b) of the sub-section ought to be deleted as it is redundant.

But in the pamphlet published by the Government of India it is said that the intention of the Parliament was to put forward this sub-section in the light of the second interpretation, namely, the Parliament wanted that the property mentioned in sub-section (2) (a) and (b) should devolve only upon the heirs mentioned in those respective parts of the sub-section and not upon the other heirs mentioned in sub-section (1). The relevant paragraph of the pamphlet runs thus :-

" In order that properties inherited from a Hindu female do not go to families to whom reason and justice would demand that they should not go, certain special rules are laid down in section 17 for their reversion to the original family. If a Hindu female who has inherited property from her father or mother dies leaving her surviving neither children nor grandchildren, although she may have left behind her husband, the property does not go to the husband but reverts to the heirs of the father; similarly if a Hindu female who has inherited any property from her husband or from her father-in-law dies leaving her surviving neither children nor grandchildren, the property goes to the heirs of the husband. These special rules apply both to movable and immovable property." (1)

If such really was the intention of the legislature in incorporating this sub-section into the Act then it must be said that the provisions contained therein are perverse and opposed to all reason; for, according to this interpretation the property which a woman inherits from her father would devolve upon the Crown in preference to her own great-grandson, great-granddaughter or husband. The undesirable contingency of the father not being the

(1) Government of India, Ministry of Law : The Law Relating to Hindu Succession (1955) pp. 15-16. Besides giving a mischievous interpretation of the section the paragraph also leaves the trails of the haste and carelessness of its scribe by misquoting the number of the relevant section.

heir but his heirs being entitled to inherit the property of a deceased woman has already been shown. It appears that the parliament did not anticipate these funny results which the whimsical part of its legislation would inevitably produce. But if it really wanted to produce such a situation and still persists in its irrational mood then it may be suggested that, at least for the purpose of clarification of the sub-section, the words 'in the order specified therein' may be deleted from both the parts of the sub-section, as they are meaningless and redundant.

In the case of persons governed by the Marumakkattayam law the property of a female devolves firstly, upon sons and daughters (including the children of any pre-deceased son or daughter) and the mother; secondly, upon the father and the husband; thirdly, upon the heirs of the mother; fourthly, upon the heirs of the father; and fifthly, upon the heirs of the husband.(1)

A recapitulation of the foregoing discussion about Marumakkattayam law would prove that the present provisions display a deliberate attempt to intermix and blend the matrilineal and the patrilineal systems of inheritance so as to bring the former into a state of transition in its move towards full patrilineal system as known to the persons governed by Hindu law.

(1) It may be remarked here that if the husband and his heirs are entitled to succeed to all the property of a woman even according to the provisions relating to the Marumakkattayi people it would be absurd to suggest that they are excluded from succession to property mentioned in s. 15(2) (a) - see supra.

A few other provisions affecting succession to women's property may be noted here :-

(1) According to s. 28 no person shall ^{be} disqualified from succeeding to any property on the ground of any disease, defect, or deformity. The provision is ^a further improvement on the Hindu Inheritance (Removal of Disabilities) Act 12 of 1928 since according to the latter ^a congenital lunatic or idiot was a disqualified heir. Moreover unlike the Act 12 of 1928 the provisions of the Succession Act 1956 apply also to persons governed by the Dāyabhāga School. (1)

(2) According to s. 26 of the Succession Act children born to a Hindu who has converted himself to another religion are disqualified from inheriting to the property their Hindu relatives unless they themselves are also Hindu at the time when the succession opens. It is strange that when the filial bond which subsists between a person himself and his Hindu relatives remains intact even after his conversion to another religion the one between his children and his Hindu relatives should be regarded as being broken.

(3) Section ¹⁶ of the Hindu Marriage Act 1955 runs thus :-

" Where a decree of nullity has been granted in respect of any marriage under section 11 or section 12, any child begotten

(1) See the overriding effect of s.4 of the Hindu Succession Act. For disqualifications under the Hindu Succession Act see ss. 24-26.

(2) For the effect of the Caste Disabilities Removal Act see supra. pp.548-49. .

or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity :...."

Thus for the purpose of determining the legitimacy of the children born of such marriage the marriage would be supposed to have been dissolved instead of having been declared null and void or annulled. But this fiction of dissolution of marriage has inevitably to be preceded by a conclusive presumption that such marriage is valid. So for the purpose of determining the legitimacy of such children the marriage ought to be considered to have been valid. The children born thereof, therefore, would be legitimate subject only to the provisions of s. 112 of the Indian Evidence Act. These children would be heirs to the property of the woman who was a party to such marriage though, according to the proviso to this section, they cannot inherit the property of any of the relatives of their parents.

(4) It is obvious that the Hindu Succession Act does not expressly include adopted relations into the schedule or heirs or in the list of heirs mentioned in s. 15. But s. 12 of the Hindu Adoptions and Maintenance Act 1956 cures this defect by putting an adopted child on common par with a legitimate natural-born child. However, it is doubtful whether an adopted son would be entitled to succeed to his relations in respect of intestacies occurring in between the period beginning with the commencement of the Hindu Succession Act and ending with the commencement of Hindu

Adoption and Maintenance Act. It has been suggested that an adopted son etc. would not be entitled to inherit property in respect of which intestacy has occurred during the intervening period.(1)

The suggestion is important and needs deeper attention. On the other hand, however, according to s. 3(j) of the Hindu Succession Act any word denoting relationship would include persons related 'by legitimate kinship'. As the Hindu Succession Act did not overhaul the whole of Hindu Law, it had left unaffected the general principle of Hindu law, namely that an adopted son is, with a few exceptions, equal to a natural-born son in all respects.(2)

Therefore the words 'son' etc. in the Succession Act would include any persons who stand in that requisite relationship with the deceased by legitimate kinship. This interpretation would include the word 'son' an adopted son as well as a natural-born son. The matter is, however, not entirely free from doubt. After the commencement of the Adoption Act, however, adopted females would also appear for the first time in the line of succession under Hindu law. Now spinsters and widows being unfettered in adopting children to themselves the number of the adopted children in succession to female's property would increase considerably.

Although detailed analysis of this Act falls outside the scope of this thesis one or two deficiencies in the same ought to be noticed here. Section 14 of the Act gives several permutations of

(1) Hindu Law Past and Present p.

(2) For an argument that a half-sister's son should be included in the words 'sister's son' occurring in Hindu Law Inheritance(Amendment) Act See Mayne 11th edi. pp. 656-57

circumstances which make the spouse of the adopting person an adoptive parent or step-parent of the adopted child. But it does not mention whether one of the spouses who has died before the adoption made by the surviving spouse becomes an adoptive parent or step-parent of the adopted child. Secondly, sub-section(3) of the same section says that when a bachelor adopts a child any woman whom he subsequently marries would be his step-mother. This would throw the adopted child into a strange position of never having had an adoptive mother and having a step-mother only. Moreover as, by marriage, a wife gets ownership in her husband's property which he has acquired not only since his marriage but also since his own birth it seems unreasonable to presume that she cannot mother a child whom he has adopted before his marriage.

Having surveyed the whole developement of the law about separate property of Hindu women from its earliest to its latest stages we now relax to recapitulate the whole trend of its progress and to forecast the possible direction and effect of its undercurrent.

We have now finished our survey of the development of the proprietary capacity of a Hindu woman and have seen that having started her economic progress by the humble possession only of bride-price and nuptial presents⁽¹⁾ she now stands in India upon an equal footing with man. It is to be hoped that, with the help of some other supplementary provisions, the recent enactments in India would cohesively be put together to form a consolidatory code. Against codification some critics raise several objections, namely, that codification is bound to be incomplete, that it will, in due course of time, be overlaid with an accumulating mass of comments and judicial decision, that it tends to stereotype the law and that being the result of the cumulative efforts of many persons it is bound to be defective and incoherent. Admitting that some of these objections against codification are true it must at once be pointed out that they can be raised a fortiori against unwritten law or common law as well.⁽²⁾ Taking into consideration these facts there is no wonder, therefore, that the opinion of many leading jurists such as Halsbury, Macaulay,

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- (1) The custom of bride price was found to prevail in 303 out of the 434 tribes statistically sampled by the English anthropologists Hobhouse, Wheeler and Ginsberg. "It is the common thing in Africa; it is the regular practice amongst the patrilineal tribes of Indonesia; and it occurs in one form or another in all other parts of the world" - E.A.Hoebel: *Man in the Primitive World* (1949) at p.206. For the significance, goal and medium of bride price see *ibid* pp.205-210. In almost all cases except those of the Romans and Protestant English the custom of bride price was gradually replaced by the custom of paying a dowry for the wife. - see T.E.James: *Prostitution and the Law* (1951) p.53. Amongst the English as amongst the Hindus the father, in due course of time, started endowing his daughter with the money which the prospective bridegroom used to pay as bride price - *Ibid* p.65.
- (2) For objections against codification and replies to such objections see B.K.Acharyya: *Codification in British India* T.L.L.1912 pp.139-149.

Pollock, Stephen, Maine, Stokes etc. is in favour of codification in modern society.⁽¹⁾

Admitting that codification is a necessity for the progressive and modern society there is no reason, however, why a particular code should go unchallenged in all its aspects. In fact the charge of incompleteness which is so often raised against codification can be met with only by a constant revision of the codified law with a view to bridge over the gap between the existing provisions of the law and the demands of social necessity as evidenced by public opinion. It would be worthwhile, therefore, to suggest a few changes in the provisions of the recent enactments in India:

The most outstanding change which has been brought about by the Hindu Succession Act is that the daughter, whether married or unmarried, succeeds to her father's property simultaneously and equally with the son. Viewed on the background of the prevalent dowry system in India this change does not appear to be wholly justifiable. It is well known that an average Hindu family in India receives a terrible economic set back by marriage of any of its female members. The dowry which the bride's party has to give to the bridegroom or his party as a condition precedent to marriage usually consists of thousands of rupees in addition to some other nuptial gifts.⁽²⁾

(1) Ibid. It may be noted that despite the misgivings of many people the Anglo-Indian Codes in general have, in the words of the late Sir James Stephen, been "triumphantly successful". - See W.Stokes: Anglo-Indian Codes Vol.I.p.71.

(2) For the development of dowry system see supra (introduction). For instances of the prevalent dowry system see Jotindranath Sarkar: The Fair Sex (1935) at pp.52-53 wherein the author quotes a few typical matrimonial advertisements from the Bengal Marriage Gazette. See also Mrs.C.A.Hate: Hindu woman and her future (1948)p.283, table No.6.

Especially amongst the poor middle class the father of the bride or, in his absence, her brother has to burdon himself with heavy debt and to toil throughout his life to be able to repay it. Such being the case it appears to be inequitable that the married daughter who has already deprived her father of a major part of his earnings should again present herself as a participant of his wealth after his death. It is necessary that her right should be completely quashed or, in the alternative, she should be allowed to succeed to her father's property only in default of all other heirs mentioned in class I of the schedule of the Hindu Succession Act. On the other hand, to fortify her complete identity with the new family by marriage it is essential to give her legal right in her husband's property. It has been shown that the identity of the husband and wife both from the economic and social points of view had always been accepted by the Sāstra in principle and practice.⁽¹⁾ During modern times the principle of common property of husband and wife has been incorporated in the legal systems of the United States, Russia and France.⁽²⁾ Even in England opinion of some of the leading scholars is leaning in favour of it.⁽³⁾ It is high time, therefore, that India should borrow in this respect the legal system of its neighbouring country, namely, Burma. There can be no doubt that the detailed working out of this principle would, as we have already seen in the case of the Burmese customary law, involve many intricacies in the provisions of

(1) Supra pp.

(2) Prostitution and the Law pp.70-71, 76 and 97.

(3) See Prof.R.H.Graveson: The Future of Family Law p.425, an essay published in 'A Century of Family Law' edited by Prof. R.H.Graveson and Prof.F.R.Crane of Kings College London.

the Act.⁽¹⁾ But from the psychological as well as from practical point of view the wife's right in her husband's property is too important to be neglected through fear of complicated and intricate legislation.

In the Hindu Marriage Act of 1955 the absence of any provision of divorce by mutual consent appears to be a serious shortcoming. Admitting that divorce, though no longer a disgrace, still "remains a tragedy, and for the children of the marriage a capital tragedy"⁽²⁾ there remains the problem of psychologically incompatible couples for whom marital life is a continuous, uninteresting and tiresome battle. It is also quite likely that the children born of such marriage stand in the danger of being juvenile delinquents through neglect or disaffection of their parents. It may be argued that in case divorce by mutual consent is allowed couples who take a light-hearted view of marital relations may try to get out of the matrimonial bond as quickly as they get in it. It may also be objected that in such case the husband might coerce the wife to signify her consent to the petition for divorce. However, it may be said against both these objections that even in the absence of any provision of divorce by mutual consent such cases might occur in the form of collusive or apparently collusive petitions in which one of the spouses makes a false and shameful charge against the other and the other meekly admits or cunningly allows it to be proved. Moreover the presence of such provision in the Special Marriage Act of

(1) For Burmese Customary Law see supra pp.

(2) The Times, 1st February 1956 quoted with approval by Prof. Graveson - A Century of Family Law p.411-12.

1954 makes all the more copious its absence in the Hindu Marriage Act.

According to the Hindu Marriage Act s.16 read with s.11 children born of a marriage which is void ab initio on account of the contravention of some of the conditions laid down in s.5 for a valid marriage, will be considered as legitimate provided they are born before the decree of nullity is given. Such children are entitled to inherit the property of both their father and mother both of whom are also naturally entitled to inherit from such children. But if the essential moral principle behind distinguishing between legitimate and illegitimate children be to disallow any man lawfully to beget children by any woman except his own wife then there is no reason why there should be any distinction between children born of a void marriage and other illegitimate children especially as the provision applies also to a case in which the contracting parties knew from the beginning that they were entering into a void marriage.⁽¹⁾ On the other hand, if the principle involved in such apparently progressive legislation be that children should not be punished for the intentional or inadvertent mistakes of their parents, then there is no reason why other illegitimate children should not be put on the same footing as children born of a void marriage before a decree of nullity in respect of that marriage is given. Moreover there is no reason why children born of such void marriage after the decree of nullity

(1) A provision similar to s.16 of the Hindu Marriage Act existed in s.21 of the Indian Divorce Act of 1869 whereby children born of a marriage which was annulled on the ground of insanity or because it was bigamous, were held as legitimate provided in the latter case the parties had contracted the marriage in good faith. The provision was probably borrowed from the Scots law which is similar - see A Century of Family Law pp.419-20.

in respect of such marriage is given should, as S.16 of the Hindu Marriage Act seems to suggest, be treated as illegitimate children. It is therefore essential for the legislature to make its choice between the traditional moral principle and the comparatively modern sociological principle and to follow it logically.

According to S.11(i) of the Hindu Adoptions and Maintenance Act of 1956 a Hindu cannot adopt so long as he or she has a son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living. This is quite in consonance with the original Hindu or Roman concept of adoption as being merely a means of perpetuating the family of a childless couple. But in England the existence of natural-born children of the adoptive parent is no bar to adopting other children. This provision in the present English law is based upon a broader and more humane principle, namely, that adoption is made not only with a desire to perpetuate the family of the adopter but also with a desire to provide the advantages of a real home for the thousands of children who, for one reason or another, are denied those advantages.⁽¹⁾ It is advisable for Hindu law, therefore, to imbiide the sociologically advanced principle accepted by the English law.

Since prostitutes were almost the first amongst women to gain economic freedom⁽²⁾ a reference must be made also to the Suppression of Immoral Traffic in Women and Girls Act 104 of 1956 according to which a prostitute could be imprisoned up to six months

(1) Prof.R.H.Graveson: The Background of the Century p.18 - an essay published in 'A Century of Family Law'.

(2) See supra chapter V.

upon her first conviction for solociting⁽¹⁾ or, may, upon information received by a magistrate, be ordered by him to remove herself from any place within his jurisdiction whether she has committed any offence under the Act or not.⁽²⁾ Admitting that prostitution is a social disease every government must realise that a war against prostitution is not a war against prostitutes.⁽³⁾ Legislation against prostitution can be of a restrictive and not of suppressive nature;⁽⁴⁾ otherwise it will merely scratch the surface and will neither restrict nor suppress prostitution. Before taking such strict measures against prostitutes the Indian Parliament ought to have considered the sociological and the anthropological view of prostitution the two precipitants, if not causes, of which are unsatisfactory marital relations and comparatively lower economic status of women in society.⁽⁵⁾ To drive away a prostitute from the so-called respectable society without considering or curing⁽⁶⁾ the causes which led her to prostitution is, to say the least, perverse and preposterous. Even in England where stricter measures have been taken against prostitutes

(1) See section 8 of the Act.

(2) Ibid s.20. For a possible abuse of the provision against solicitation see Prostitution and the Law p.126 and A Century of Family Law p.287.

(3) See, for instance, the correct attitude adopted by the Soviet Government - Prostitution and the Law p.

(4) Remarking that 'Prostitution is a commercial enterprise and will not be suppressed by legislation...' (at pp.24-25) T.E. James concludes: "It is considered that little if any good would be achieved merely by amendments to the laws relating to prostitution and kindred offences.Strictly, research should be conducted on a scientific basis into the emotional causes in both the male and female partners to the act of prostitution; pending any such course being taken the law 'must be a teacher.'" - Prostitution and the Law pp.132-133.

(5) Ibid pp.12 and 57. For prostitution as an emotional problem see ibid p.4 and Encyclopedia Britannica Vol. pp.

(6) For a succinct resume of the possible methods of this cure see Prostitution and the Law p.124.

since September 1959 judges and learned scholars have opined that such stricter measures against prostitutes would merely drive the profession underground.⁽¹⁾ It must not be forgotten that prostitution will thrive so long as there is demand for prostitutes.⁽²⁾

There are two groups amongst the critics who oppose the economic equality granted to Hindu women by the Hindu Succession Act 1956. The first group contends that the inequality between the two sexes is natural and hence perpetual. The gist of the mentality of these critics is well represented by Tennyson in his poem 'The Princess':

"Man for the sword and for the needle she :
Man with the head and woman with the heart :
Man to command and women to obey ;
All else confusion."

Ignoring all the provisions in the Śāstra in favour of women such critics resort to some old and archaic provisions in the smritis which tend to lower the position of women and, for the purpose of substantiating their own stand, resort to so-called sociological arguments which, on their very face, are bigotrical and illogical.⁽³⁾ The best way of replying to such critics is to ignore them.

The other group of critics, although it supports in principle the economic equality between men and women, has a subtle argument against the sudden introduction of such economic equality.

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- (1) Ibid p.125. See also the speech made at Vancouver by Lord Parker, the Lord Chief Justice of England, as reported in the News Chronicle of 3.9.1959 or The Times of 4.9.1959.
- (2) It is remarkable that no country except the U.S.S.R. claims to have totally wiped out prostitution, but it is difficult to ascertain the truth of the bold claim made by the U.S.S.R. - see the Prostitution and the Law pp.6-7,9,92,102.
- (3) For an excellent and comparatively a larger specimen of this type see V.V.Deshapande: Dharmashastra and proposed Hindu Code (1943).

These critics contend that emancipation of women has three facets, namely, economical, political and social all ^{of} which should progress parri passu. They argue that the growth of the social emancipation of women in India is not complete and that such being the case to grant them complete economic freedom at this stage would, even from the point of view of women's own interest, be disadvantageous and disastrous. To examine the truth of this argument we may profitably refer to the history of the growth of emancipation of women in England from which country modern India has borrowed most of its legal, social and political principles.

To begin with, the economic position of a married woman in England before 1870 was much worse than that of a Hindu married woman in India. Except in the case of a marriage settlement to the contrary, almost all the property of a woman together with the woman herself became, upon her marriage, her husband's property.⁽¹⁾ It was the Married Women's Property Act of 1870 which first recognised women's right in their earned property. ^{The} Married Women's Property Act of 1882 brought about further amelioration and put women almost on equal footing with men till the Married Women's Property Act of 1893 recognised full and equal status of women in proprietary matters.⁽²⁾ However, the social and political emancipation of women was not simulteneous with their economic emancipation. Although the movement of triple emancipation of women had acquired a great momemtum by the middle of the 19th century and although women gained a great number of supporters from men in the second half of the same

(1) Prostitution and the Law pp.63-66; A Century of Family Law p.2.

(2) A Century of Family Law pp.15-16.

century⁽¹⁾ "The truth was that in the nineties the women's movement was in the doldrums: people had grown tired of talking about it; the press ignored the women's campaign: women's rights had become a bore. Even the Labour party which at first had been sympathetic sheered away from the issue lest it should harm their own cause."⁽²⁾ It is significant that despite their economic emancipation in the nineties of the nineteenth century women were not granted the right to vote in, or stand for, the Parliamentary elections till 1918.⁽³⁾ As regards education it is interesting to remember that the first time women were admitted to degree course was in 1878 in London. Cambridge admitted them in 1892 and they did not have the same advantage at Oxford till 1920.⁽⁴⁾ As regards professions it may be noted merely that women doctors numbered only 25 in 1881, 100 in 1891, 212 in 1901 and 477 in 1911,⁽⁵⁾ Till 1922 women could not be legal practitioners. As regards many other professions and services they could not march shoulder to shoulder with men till the Sex Disqualification Act (Removal) Act of 1919 was passed.⁽⁶⁾ It is evident, therefore, that even in England, from which India has borrowed its inspiration in this respect, the economic emancipation of women had not been contemporaneous with their social and political emancipation. Even now in England, as in India, there are a 'large

(1) For a succinct survey of the women's movement during the 19th century see Norman St. John-Stevass: Women in Public Law pp. 256-75 - an essay published in A Century of Family Law; Margaret Mead: Woman, Position in Society, Encyclopedia of Social sciences (1932) Vol. XV.

(2) A Century of Family Law pp. 275-76.

(3) Ibid p. 282.

(4) Ibid pp. 268-70.

(5) Ibid pp. 270-72.

(6) Ibid p. 283; Prostitution and the Law p. 66.

number of people' who regret this modern trend of the society towards equality of sexes.⁽¹⁾

As against this we must take a review of women's movement in India. The movement of emancipation of women was first started in India in the last quarter of the 19th century by the late Mr. Gopalrao Agarkar and Dr. D.K. Karve whose birth centenary was officially celebrated last year by the Indian Government by issuing special postage stamps. Then outstanding women like Mrs. Ramabai Ranade, Pandita Ramabai, Mrs. P.K. Ray, Lady Bose and other worked with the help of Mrs. Annie Besant, Mrs. Margaret Cousins etc. for the uplift and emancipation of Indian women. As a result of the deputation of the Women's Indian Association which was established in 1917 women participated, though on a limited restricted franchise, in the 1926 elections. In the struggle for independence Gandhiji used the means of non-violent co-operation and thought that the technique was specially suited to women. As a result of this in the first ten months of the Satyagraha movement of 1930 nearly 17,000 women who had taken part in the movement were convicted. In 1936 a large number of women came to legislature. In the 'Quit India' movement of 1942 several women took part with the same enthusiasm as men.

In the first general election based on adult franchise 23 women were elected to the Lok Sabha and 19 were elected to the Rajya Sabha. In the 1957 elections 27 women were returned to the Lok

(1) Prostitution and the Law p.

Sabha and amongst the persons elected as members of the states' legislatures nearly 10 per cent were women. There have been women ministers both in the Union and state Governments. Mrs. Vijaya Lakshmi Pandit has served not only as a High Commissioner for India but also as a president of the General Assembly of the United Nations. On the professional side it may be noted that nearly 21 per cent of the one million teachers in India today are women. Nearly 77,000 women are in the medical and health services. The Government of India itself employs 20,668 women. The report of the 1951 census revealed that nearly five million women were at that time self-supporting and from amongst them 800,000 were engaged in production and 500,000 women in commerce.⁽¹⁾ The progress of literacy amongst women today compares favourably with that amongst men.⁽²⁾ It is therefore evident that the position of women in India today is not only equal but in many respects far superior to the position of English women in 1882 when the Married Women's Property Act was passed there. It is hoped that this comparative survey would convince those critics who advise the Government to adopt in this respect the Fabian virtue of hastening slowly, that the economic emancipation of women brought about by the Hindu Succession Act was not only timely but, in fact, belated.

But ~~in~~ even in the present age of equality of sexes there stands a broader question before our eyes, namely, whether equality of sexes means identical and equally valuable work for both the

(1) For the above information see India 1958 pp.120-123 - a publication of the High Commissioner of India in Great Britain.

(2) See the literacy tables given in India 1958 - a publication of the Government of India, Delhi.

sexes or supplementary and equally valuable work for them. Even at present women expect from men chivalry, in social atmosphere and maintenance in difficult times. The husband is bound to maintain his wife whereas the latter has no corresponding obligation. The wife can pledge her husband's credit for the purpose of her necessities though the husband does not possess a corresponding right even against his wealthy wife. As Sir Alfred Denning has pointed out "By putting these obligations on the husband, moreover, the law recognises the natural state of affairs whereby the man's proper function is to work to provide for his wife and family, and the woman's proper place is to look after the home and bring up the children. If a wife is to do these things properly, she has usually to withdraw from the money market and find her reward in the home - a reward which is much more worth while."⁽¹⁾ Many women have realised that competition with men in outside work is only the means and not the end of the struggle of establishing the equality between the two sexes. Women have already proved that they could equal men in almost every sphere which was till recently supposed to be man's exclusive sphere. But there are certain other spheres in which women not only equal but surpass men. Drawing the family budget, looking after the house, bringing up children are some of the things in which men can never hope to outbeat women and the former have now realised that this sphere of work is by no means less important, intricate or valuable than the sphere of work in offices, factories and workshops. It is well known that apart from the economical

(1) Sir Alfred Denning: The Changing Law p.98.

aspect of the problem the difficulties suffered by a widower in bringing up his children are much worse than the difficulties suffered by a widow; for a widower can purchase a house but he cannot make a 'home' of it. The progress of a nation depends as much upon this life within the four walls of a 'home' as upon the life without. It is indeed in commendation and not in humiliation that the Vedic literature says that the wife is the mistress of the house.⁽¹⁾ Manu declares that the wife should be given the job of accumulation and disbursement of money. In India the majority of the husbands of the modern generation find that on the first of every month their pay-packets are immediately taken possession of by their wives and the former ungrudgingly concede the latter's right to do so, for they have realised, not necessarily to their discomfiture, that their wives can manage the family income and expenditure much more competently than they themselves could. Let us hope that this idea of partnership in marriage which is based on the principle that the husband earns for the family and the wife spends for it shall soon crystalise in the message given to us by a Victorian poet :

Either sex alone
Is half itself, and in true marriage lies
Nor equal, nor unequal : each fulfils
Defect in each, and always thought in thought,
Purpose in purpose, will in will, they grow,
The single pure and perfect animal,
The two-cell'd heart beating, with one full stroke,
Life."

(1) Supra p.

(2) "Arthasya saṅgrāhe chainām vyaye chaiva niyojayetl" - Manu IX-11.

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गौतमः

- (१) रक्तीधनं दुहितृणामप्रत्तानामप्रातिष्ठितानां च ।-गौ.ध.सू. २८.२५; गौ.मि. २८.२२.
 (२) भगिनीशुलकं सौदर्याणामूर्ध्वं मानुः ।-गौ.ध.सू. २८.२६; गौ.मि. २८.२३.
 (३) पूर्वं चैके ।-गौ.ध.सू. २८.२७; गौ.मि. २८.२४.

(४) आपस्तम्बः

- (४) अलङ्कारो भार्याया ह्यतिधनं चैत्येके ।-आ.ध.सू. २.१४.९.

बौधायनः

- (५) मानुरलङ्कारं दुहितरः सांजडायेकं लभेरनन्यद्वा ।-बौ.ध.सू. २.२.४९
 (६) ऋतयं मृतायाः कन्यायाः गृह्णीयुः सौदराः स्वयम् । तदभावे भवेन्मानुस्तदु-
 भावे भवेत्पितुः ॥-बौ.ध.सू. २.३.१६ मिताद्वारादिग्रन्थेषु निर्दिष्टम् । मिता. २.१४६;
 दा.भा. ४.३.७.

- (७) रक्तीधनं मानुगामि तदभावे सौदुरानुगामि ।-बौ.ध.सू. २.३.१७ सरस्वतीविलासे
 निर्दिष्टम् । स.वि. ३८४.

वासिष्ठः

- (८) मानुः पारिजेयं । रक्तीयो निमज्जेरन् ।-व.स्मृ. १७.४३. दा.भा. ४.२.१५
 पारिजेयं (पारिजाद्यं); अप. २.११७ पारिजेयं (परीजाहयं); व्य.क. ६६९
 पारिजेयं (पारिजाहयं); बी.मि. ५४८ पारिजेयं (पारिजाद्यं); बाल. २.१२५
 पारिजेयं (पारिजाहयं). धर्मकोशे वासिष्ठस्मृते पारिजाद्यमिति पाठो गृहीतः । तस्य
 नुपपत्तेर्मूलग्रन्थपाठरच्यकरणस्योचितत्वाच्च पारिजेयमिति पाठोऽत्रानुसरितः ।

विष्णुः

- (९) पितृमानुसुतानां दत्तमध्यगुणागतमाद्येवेदुनिकं बन्धुदत्तं शुलकमन्वाधेयक-
 मिति रक्तीधनम् ।-वि.स्मृ. १७.१८. वि.र. ५२३ सुत (सुहृद्); वि.पि. १३८ वि.र. नव
 (१०) ब्राह्मादिषु चनुषु निनाह्वेष्वप्राजायामतीतायां तद्भुतुः । शेषेषु च पिता
 हरेत् ।-वि.स्मृ. १७.१९-२०.

(११) सर्वेष्वेव प्रसूतायां यद्युतं तदुद्दिष्टमात्रम् । - वि. स्मृ. १७. २१.

(१२) सौदायिकं रक्ती यथाक्रममाप्नुयान् । वि. स्मृ. वचनं स. वि. ३७७ इत्यत्र निर्दिष्टम् ।

(१३) यौतकं मानुः कुमारौदाय मन् । - वि. स्मृ. वचनं स. वि. ३८३ इत्यत्र निर्दिष्टम् ।

(१४) भागिनीशुल्कं मानुः सौदराणामेव । वि. स्मृ. वचनं स. वि. ३८४ इत्यत्र निर्दिष्टम् ।

शङ्खः लिखितः शङ्खालिखितो वा

(१५) विभज्यमाने द्वायाद्ये कन्यालङ्कारं वैवाहिकं रक्तीधनं कन्या लभेत् । - शङ्ख -
वचनं स. वि. ३६२ इत्यत्र निर्दिष्टम् । बी. मि. ४५६ रक्तीधनं च (च रक्तीधनं) .

(१६) समं सर्वे सौदुर्या मानुकं रिक्थमहन्ति कुमार्यश्च । - शङ्खवचनं बाल.

२।११५ इत्यत्र निर्दिष्टम् । द्वा. भा. ख. २. ४ मानुकं रिक्थं (द्रव्यं) .

(१७) स्वं च शुल्कं बोढा । - शङ्खवचनं स. वि. ३८५ इत्यत्र निर्दिष्टम् ।

(१८) प्रेतायाः पुत्रिकायाः न भर्ता ह्यपमर्हत्यपुत्रायाः । - शङ्खवचनं अप. २. ११५
इत्यत्र निर्दिष्टम् ।

कौटिल्यः

(१९) नृपतिरावेन्ध्यं वा रक्तीधनम् । परद्वेसाहरता रथाभ्या वृत्तिः । आब-
न्धमानैश्चनः । अपुत्रा वतिशायनं चोत्पन्नत्वे गुरुसत्तिप रक्तीधनं उत आयुः -

कुमादु भुञ्जीत, आपदुसो हि रक्तीधनम् । उद्वे द्वायादु गच्छेत् । जीवति

भर्तारि मुवायाः पुत्रा दुहितरश्च विभजेरन् । अपुत्राया दुहितरः । तदुभावे

भर्ता । शु. कन्यायश्च सत्यमन्यद्वा कन्या अकुच बाल्यमा हरेत्पुः । इति

रक्तीधनकल्पः । - अर्थशारदास्य वृत्तिषा विवर्तयत्यर्थे रक्षितोपायव्यवस्थ

धर्मे कौशलमोक्तमाशानुसारं । कानि विदुषह्वन्पुत्रा नान्यत्वात्प्रोक्तानि ।

ज्ञातशान्तिं संशोचितपुस्तके उत आयुः कुमादु (आयुः कुमादु) मृतायाः

(मुतायाः) दुहितरश्च (दुहितरश्च रक्तीधनं) इति पाठो मृहीतः - मुपाकाः

१५२-१५३ । मुतायाः इति कपुतायेव 'सुतायाः' इत्यस्य भ्रष्टमुद्रा ।

मनुः

- (२०) रक्षीधनानि तु ये मोहादुपजीवन्ति बान्धवाः । नारीयातानि वरुणं वा ते
पापा यान्त्वधोगतिम् ॥ - म. स्मृ. ३. ५२.
- (२१) मानुस्तु यौतकं स्यात्कुमारीभाग इतः सः ॥ - म. स्मृ. ९. १३१
- (२२) द्वाौ तु यौ विनदुयातां द्वाभ्या जातौ रिश्या धने । तयोर्विधस्य विज्यं
स्यात्तस्मि गृहीत नेतरः ॥ - म. स्मृ. ९. १९१.
- (२३) जनन्यां संस्पृतायान्तु समं सर्वे सहोदराः । अजरन्मानुकं रिशयं भगि-
न्यश्च सनाभयः ॥ - म. स्मृ. ९. १९२.
- (२४) यास्तासां स्युर्दुहितरस्तासामपि यथार्हताः । मातामहया धनात्काम्येत्प्रदुयं
प्रीतिपूर्वकम् ॥ - म. स्मृ. ९. १९३.
- (२५) उन्धपुत्राद्यावाहनिकं च दूतं च प्रीतिकर्मणि । भ्रातृमातृपितृप्राप्तं जाद्विधं
रक्षीधनं स्मृतम् ॥ - म. स्मृ. ९. १९४. मूलग्रन्थे 'प्रीतिकर्मणि' इति मुद्रितम् ।
- (२६) अन्वाधेयं च यदुतं पत्या प्रीतेन चैव यत् । पत्यौ जीवति तु तस्याः
अजायारतवदुतं भवेत् ॥ - म. स्मृ. ९. १९४.
- (२७) ब्राह्मिद्वयमिगान्यनप्राजाय येषु यदुतम् । अप्राजायाश्चोताया भर्तुरेव
तदुप्यते ॥ - म. स्मृ. ९. १९५.
- (२८) यस्त्वस्याः स्यादुतं दूतं विनदुष्मासुरादिषु । उपप्राजायामप्रीतायां मातापित्रो-
स्तदुप्यते ॥ - म. स्मृ. ९. १९७.
- (२९) रिश्यास्तु यदुबोद्धतं पित्रो दूतं कथञ्चन । ब्राह्मणो तदुदुरतकन्या तदु-
पत्यस्य वा भवेत् ॥ - म. स्मृ. ९. १९८.
- (३०) न निहीनं रिश्याः कुमुः कुटुम्बाद्बहुमध्यगतम् । स्वकादुपेयं च विनादु-
स्वस्य भर्तुरनाज्ञया ॥ - म. स्मृ. ९. १९९.
- (३१) पत्यौ जीवति यत्प्रजाभिरतद्वारो धृतो भवेत् । न ते अजरन्दुयाद्वा
अजमानाः पतन्ति ते ॥ - म. स्मृ. ९. २००.

याज्ञवल्क्यः

- (३२) विभजेरन्मुताः पित्रोरुर्ध्वमिच्छन्मृणं समम् । मातृदुहितरक्षोष्मृणात्ताभ्य-
 क्रुतेऽन्वयः ॥ - या. स्मृ. २.११७.
- (३३) पितृमातृपतिभ्रातृदुत्तमध्यग्न्युपागतम् । आधीनदुनिकाद्यं च रक्षोध्यनं
 परिकीर्तितम् ॥ - या. स्मृ. २.१४३. विश्वरूपविज्ञानेभ्यरापराक्रमिगमिभ्रकृत-
 याज्ञवल्क्यस्मृतिटीकासु तथा स्मृ. चं. ६५२, प. मां. ३६८, मं. पां. ६७०, मं. र.
 ३७५, नृ. प्र. २३६, स. वि. ३७९, वी. मि. ५४१, न्य. मं. १५२, वि. ता. ४४०
 इत्यादिग्रन्थेषु च 'आधीनदुनिकाद्यं' इति पाठ एव स्वीकृतः । डा. भा. ४.१.१३,
 डा. क्र. सं. इत्यत्र 'आधीनदुनिकं चैव' इति पाठो उद्धृतः । वि. र. ५२३ इत्यत्र
 च 'आधीनदुनिकं चापि' इति ।
- (३४) बन्धुदत्तं तथा शुल्कमन्वाधेयक्रमेण च । अतीतामज्जारीं बान्धवास्तदु-
 वाप्नुयुः ॥ - या. स्मृ. २.१४४.
- (३५) अज्जजरक्षोध्यनं भगुत्राह्मादिषु चतुष्पदे । दुहितृणां प्रसूता चैच्छेषेषु
 पितृगामे तान् ॥ - या. स्मृ. २.१४५.
- (३६) दुत्वा कन्यां हरदुःखोऽयं दुःखाय सौदुर्यं । मृतायां दुत्तमादुद्यात्पारि-
 शोध्योभयत्पयन् ॥ - या. स्मृ. २.१४६.
- (३७) दुर्भिक्षे धनकार्ये च त्वाद्यौ संजारीष्यन् । गृहीतं रक्षोध्यनं भग-
 न् । रक्षेयै दुत्तुमर्हति ॥ - या. स्मृ. २.१४७.
- (३८) आधीनत्वारक्षेयै दुद्यादुधनदुर्गमं समम् । न दुत्तं रक्षोध्यनं यस्मै
 दुत्ते त्वयं प्रकीर्तितम् ॥ - या. स्मृ. २.१४८.

नारदः

- (३९) अद्यग्न्यध्यावाह्निकं भगुत्तमस्तथैव च । मातृदुतं पितृभ्यां च
 षड्भिर्यं रक्षोध्यनं स्मृतम् ॥ - नार. स्मृ. ३६. ८, मां. र. १४. ८.
- (४०) भगो जौतनं यदुत्तं रक्षेयै तारतन्मुनेऽपि तन् । सां यथाकायमज्जारी-

यादुधाद्धा स्यावराहते ॥ - ना. स्मृ. ४.२८, ना. सं. २.२४.

(४१) पितर्युधनं गते पुत्रा विभजेरन्धनं क्रमात् । मातुर्दुहितरौ उभावे दुहितृणां तदुत्तरयः ॥ - ना. स्मृ. १६.२, ना. सं. १४.२ इत्यत्र प्रथम परणक्षयस्य भित्तः

किन्तु समानार्थकः पाठः ।

(४२) रक्षीधनं तदुपत्यानां भर्तृगाम्यप्रजासु तु । ब्राह्मादिषु चतुर्ष्वोहुः पितृ-
गामैतरेषु च ॥ - ना. स्मृ. १६.३, ना. सं. १४.३ तु (च) च (तु) .

बृहस्पतिः

(४३) रक्षीधनं स्यादुपत्यानां दुहिता च तदुद्दिनी । उप्रसा येत्समुदा तु
लभते मानमात्रकम् ॥ - बृ. स्मृ. वचनं अप. २.११७ इत्यादिषु निर्दिष्टम् ।

दा. भा. ४.२.३ स्या (त) लभते मानमात्रकम् (न लभेन्मानकं धनम्) .

(४५) मातृपुत्रसा मातृपुत्री पितृव्यरक्षी पितृपुत्रसा । अश्रूः पूर्वजपत्नी च मातृपुत्र्याः
प्रकीर्तिताः ॥ यदासामौरसो न स्यात्सुतो दुहितेन पुत्र वा । तत्सुतो वा धनं तासां
स्वसृयाद्याः समाप्नुयुः ॥ - बृ. स्मृ. वचनस्य धर्मकोशे स्वीकृतः पाठः । दा. भा.

४.३.३१, अप. २.१४५ इत्यादिषु समानार्थकाः पाठभेदाः स्वीकृताः ।

कात्यायनः

(४६) अध्वगृह्यावाहनिकं दत्तं च प्रीतितः । रक्षीधनं स्मृतम् ॥ - का. स्मृ. वचनं दायभागदिषु दृष्टम् । दा. भा. ४.१.४, का. स्मृ. सा. ८९४

(४७) विवाहकाले यत्प्रकीर्तितं दियते स्याद्विनिर्दिष्टम् । तदुध्याग्निकृतं साधुः

रक्षीधनं प्रकीर्तितम् ॥ - का. स्मृ. वचनं मितानुरादायभागदिषु दृष्टम् । मितानु. २.१४३, दा. भा. ४.१.५, का. स्मृ. सा. ८९५.

(४८) यत्पुनर्लभते नारी तीयमाना पितुर्गृहात् । अध्वगृह्यावाहनिकं नाम रक्षीधनं
तदुद्दिह्यते ॥ - का. स्मृ. वचनं मितानुरादायभागदिषु दृष्टम् । मितानु. २.१४३,

दा. भा. ४.१.५ पितुर्गृहात् (हे पितृकाल) , का. स्मृ. सा. ८९६.

(४९) प्रीत्या दत्तं तु यात्कीर्तितं अथवा वा अशुरेण वा । पादुवन्दनिकं चैव

- प्रीतिदत्तं तदुच्यते ॥ - का. स्मृ. वचनं मिताश्रयादिषु बद्धतम् । मिता. २. १४१, का. स्मृ. सा. ८९७.
- (५०) उदया कन्यया नापि पत्युः पितृगृहेऽपि ना । भ्रातुः सकाशात्पित्रोर्वा लब्धं
सौदामिकं स्मृतम् ॥ - का. स्मृ. वचनं मिताश्रयादिषु बद्धतम् । मिता. २. १४२, डा. भा.
४. १. २१ पि ना (थवा) भ्रातुः (अनुः), का. स्मृ. सा. ९०१, शु. नी. ४. ८१३-
८१४ इत्यत्र श्लोकद्वये प्रतद्धचनं विप्रक्तं द्वितीयं श्लोकं च प्रतद्धचनद्वितीयार्थं
'मानृपिणादिभिर्दत्तं धनं सौदामिकं स्मृतम् ।' इति मुद्रितः ।
- (५१) विनाहात्परतो यत्तु लब्धं अर्नृकुलात्स्त्रिया । अन्वाधेयं तदुक्तं तु लब्धं
वन्धुकुलात्तथा । - का. स्मृ. वचनं दायभागादिषु बद्धतम् । डा. भा. ४. १. २, ४. ३. १६,
का. स्मृ. सा. ८९९.
- (५२) उद्वं लब्धं तु यात्किञ्चित्संस्कारात्प्रीतितः स्त्रिया । अनुः पित्रोः सकाशाद्वा
अन्वाधेयं तु तदुभृगुः ॥ - का. स्मृ. वचनं दायभागादिषु बद्धतम् । डा. भा. ४. १. २,
४. ३. १८ पित्रोः सकाशाद्वा (सकाशात्पित्रोर्वा), का. स्मृ. सा. ९००.
- (५३) गृहोपस्करनाह्यानां दोह्याभरणकर्मणाम् । मूल्यं लब्धं तु यात्किञ्चित्पुलकं
तत्परिणीतम् ॥ - का. स्मृ. वचनं दायभागादिषु बद्धतम् । डा. भा. ४. ३. १९ म
(मि), अप. मि (मि) त्वं (त्वय), बाल. २. १४४, का. स्मृ. सा. ८९८.
- (५४) पितृमातृपतिभ्रातृस्त्रातिभिः स्त्रीधनं विक्रये । यथाशक्त्या द्विसाहस्रादुलब्धं
स्थानरादौ ॥ का. स्मृ. वचनं वीरामित्रादुयादिषु बद्धतम् । वी. मि. ५४४, का. स्मृ. सा. ९०२.
- (५५) तत्र सौधे यदुक्तं यच्च योगवशेन वा । पित्रा मात्राऽथवा पत्या न तत्स्त्री-
धनमुच्यते ॥ - का. स्मृ. वचनं वीरामित्रादुयादिषु बद्धतम् । वी. मि. ५४२, का. स्मृ. सा. ९०३.
- (५६) प्राप्तं शीतपैस्तु यदुक्तं ज्ञात्वा येन यदुच्यतः । अनुः स्वाभ्यं अवेतत्र शेषं
तु स्त्रीधनं स्मृतम् ॥ - का. स्मृ. वचनं दायभागादिषु बद्धतम् । डा. भा. ४. १. १९, का. स्मृ. सा. ९०४.
- (५७) सौदामिकं सहा स्त्रीणां स्वातन्त्र्यं परिणीतम् । विक्रये येन दाने च यथेष्टं
स्थानरेष्वपि । - का. स्मृ. वचनं दायभागादिषु बद्धतम् । अप. २. १४३, डा. भा. ४. १. २१,
का. स्मृ. सा. ९०६.

(५८) सौदायिकं धनं प्राप्य रक्षणीणां स्वातन्त्र्याभिप्यते । यस्मात्तद्वानुशंस्यार्थं तद्वृत्तं
तत्प्रजीननम् ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२१, का. स्मृ. सा. ९०५.

(५९) अथ चेत्स हि भायः स्यान्त य तां भजते पुनः । प्रीत्या विसृष्टमापि चेत्प्रातिदाप्यः
स तद्वृत्तात् ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२४, का. स्मृ. सा. ९०८

(६०) ग्रामाच्छादुननासानामाच्छेदो यत्र योजितः । तत्र स्वमादुर्दिता रक्षी विभागं
रिक्तयेतां तथा ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२४ माच्छे
(मुच्छे), का. स्मृ. सा. ९०९.

(६१) व्याधीतं व्यसनस्ये च धनिकनीपि योडितम् । ज्ञात्वा विसृष्टं यः प्रीत्या
दुधादुल्लेख्यया तु सः । का. स्मृ. वचनं अपराकाङ्क्षिभिर्निर्दिष्टम् । अप. २.१४०,
का. स्मृ. सा. ९१४.

(६२) अपकाराक्रिययुक्ता नित्यया चार्थनाशिका । व्याभिचाररता या च रक्षीधनं
न च साहिति ॥ - का. स्मृ. वचनं अपराकाङ्क्षिभिर्निर्दिष्टम् । अप. २.१४० न च सा
(सा च ना), का. स्मृ. सा. ९२९.

(६३) न भवति नैव च सुता न पिता भ्रातरौ न च । आदुर्दिता विसर्गो वा रक्षीधनं
प्रभारिणाव ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२४, का. स्मृ. सा. ९११.

(६४) योऽपि स्वस्वस्वरस्वेषां रक्षीधनं भक्षयैतद्वृत्तात् । समुद्दिष्टं प्रातिदाप्यः स्यादुद्धं
यैव सानुयाय ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२४, का. स्मृ. सा. ९१२.

(६५) तद्वृत्तं यद्यनुज्ञाय भक्षयः प्रातिपुनः । मूलमनं तदा दायो यदा स धन-
वा भवन् ॥ - का. स्मृ. वचनं दायभागानिष्कृतम् । दा. भा. ४.१.२४, का. स्मृ. सा. ९१३.

(६६) ज्ञातव्यं वा तदनुज्ञाय भक्षयः । योऽपि स्वस्वस्वेषां रक्षीधनस्येता
दुद्धमस्वस्वरस्वेषां सः ॥ - का. स्मृ. वचनं अपराकाङ्क्षिभिर्निर्दिष्टम् । अप. २.१४२, का. स्मृ. सा. ९१५.

(६७) अत्रा भ्रातृकुलं द्वौ भूयस्वत् रक्षीधनं सुतेना । तद्वृत्तं पुनः सा पुनः सा
विदुः सौतेन ॥ - अपराकाङ्क्षिभिर्निर्दिष्टम् । का. स्मृ. वचनस्य धर्मकोशे
स्वीकृतः नैव । ध. को. १.४५८, का. स्मृ. सा. ९१६.

देनलः

- (७४) पुनीराभरणं शुक्लं लोभय रक्तीधनं भवेत् । भौकरी तत्स्वयमेवेदं पति-
गोहृत्यलापदि ॥ - दे. स्मृ. वचनं द्वायभागादिषु दृष्टम् । डा. भा. ४.१.१५.
(७५) वृथा मोक्षे च भोगे च । रक्षेयं दुःखात्समुद्धिक्तम् । पुत्रार्तिहरणे वापि
रक्तीधनं भोगुमर्हति ॥ - दे. स्मृ. वचनमपराधविमिश्रितं रितम् । अप. २.१४७.
(७६) सामान्यं पुत्रकल्याणं भूतयां रक्तीधनं प्रकृतम् । अत्राज्ञायां हरेद्भुता माता
भ्राता पितापि वा ॥ - दे. स्मृ. वचनं द्वायभागादिषु दृष्टम् । डा. भा. ४.२.६.

यमः

- (७७) आमुखादिषु यद्द्रव्यं निवाहेषु प्रदीयते । अत्राज्ञायां महीतायां पितृव तु
धनं हरेत् ॥ - य. स्मृ. वचनं द्वायभागादिषु दृष्टम् । डा. भा. ४.२.२८
(इति धर्मः) , स्मृ. च. ६६३.

वृद्धहारीतः

- (७८) पितृभ्रातृसुता भ्रातृपत्यपत्याद्युपागतम् । आश्रितनिकायं च रक्तीधनं
परिकीर्तितम् ॥ - वृ. हा. स्मृ. ७.२५७.

कण्वः

- (७९) रक्तीधनस्येशिनी रक्ती स्याद्भुता च तदनुज्ञया । भोक्तुं रक्षयितुं योग्यो
भर्तुं नाशयितुं न च ॥ कण्ववचनं मस्करिणा निर्दिष्टम् । गौ. ध. सू. १८.१.

पारस्करः

- (८०) अत्रतायास्तु दुहिबुः रक्तीधनं परिकीर्तितम् । पुत्रस्तु नैव तत्र
प्रज्ञायां तु समांशभाक् ॥ - पारस्करवचनं माधवादिभिरुद्धृतम् । प. प्रा.
३०२.

पैठीनारिः

- (८१) कन्या नैवाहिकं रक्तीधनं च लभेत । पैठीनासिनचनं वरदुराजोद्धृतम् ।

